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S. Hrg. 99-1071

VISUAL ARTISTS RIGHTS AMENDMENT OF 1986

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2796

A BILL TO AMEND THE COPYRIGHT LAW TO SECURE THE RIGHTS OF ARTISTS OF PICTORIAL, GRAPHIC, OR SCULPTURAL WORKS TO PREVENT THE DISTORTION, MUTILATION, OR OTHER ALTERATION OF SUCH WORKS, TO PROVIDE FOR RESALE ROYALTIES, AND FOR OTHER PURPOSES

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VISUAL ARTISTS RIGHTS AMENDMENT OF 1986

NOVEMBER 18, 1986

U.S. Senate,
Subcommittee on Patents,
Copyrights and Trademarks,
Committee on the Judiciary,
New York, NY.

The subcommittee met pursuant to call at 10 a.m., at Cooper Union Art School, New York, NY, Hon. Edward M. Kennedy (member of the subcommittee) presiding.

Staff present: Carolyn P. Osolinik, minority counsel, and Kathy Kruse, professional staff member, Office of Senator Kennedy.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator **Kennedy**. The hearing will come to order.

First of all, I would like to express on behalf of the Senate Judiciary Committee our very deep sense of appreciation to Mr. Green, the vice-president of Cooper Union, and to the trustees and all of those associated with this institution, for their courtesies, their hospitality, and their willingness to make this facility available to our Senate Judiciary Committee.

I think all of us are very mindful of the importance and significance of this institution. It is one of, if not the premiere, institution in the areas of the arts, engineering and architecture. Its reputation is well known, not only in this city and State, but around the country and around the world. It still maintains the policy of no fees or tuition. It is the only privately held institution in our country that is so committed, and its excellence is well understood. It is only appropriate that our Judiciary Committee commence its hearing today during the National Arts Week, and that we come here to this very fine institution.

This hearing of the Senate Subcommittee on Patents, Copyrights and Trademarks is convened to hear testimony on S. 2796, the Visual Artists Rights Act. It is the right time and the right place to do so. This is the National Arts Week, and we are here at one of the most distinguished schools for advancement of science and the arts.

The bill, which I introduced in September, seeks to improve the copyright protection for visual artists and recognize the intrinsic value of our national cultural heritage and the need to sustain an environment in America which encourages cultural diversity and artistic excellence.

The issues addressed in the legislation are not new. Other nations have considered and implemented comparable provisions many years ago. We will have testimony today from a number of expert witnesses whose interests and livelihoods are directly related to the arts. I look forward to hearing their views of the proposed legislation and its impact on the artistic community.

The Visual Artists Rights Amendment addresses three major sources of concern for visual artists: copyright notice, moral rights, and resale royalties.

Under current law, artists are often unwilling to register their work with the Copyright Office because of the accompanying requirement that a formal copyright notice be physically displayed on their work. The failure to register, however, can have serious consequences if a copyright infringement occurs. A work of art properly registered at the time of creation is eligible for full statutory damages in the case of a copyright violation. A work which is registered at the time an infringement occurs, however, is limited only to actual damages, which are difficult to prove and often substantially lower than damages provided by the Statute.

A change in the copyright law to help artists, not violators, is long overdue. S. 2796 provides full copyright protection for works of art without any requirement that a copyright notice be affixed to the work. Elimination of the notice requirement will guarantee all artists the copyright protection they need, and will deter violators. Without the notice requirement, artists are more likely to register their works, and the public will also benefit from the greater protections available for the nation's artistic heritage.

A second component of the legislation is designed to protect the integrity of works of art in the hands of subsequent owners. These so-called "moral rights" of artists include the right to be recognized as the creator of a work of art, and the right to protect the integrity of the work against unauthorized alteration, destruction or mutilation.

This concept of moral rights is not new. The Federal Government and all 50 States, for example, have recognized the importance of historic preservation. Yet, artists cannot now be certain of protection from damages to their work once they are sold, and examples of mistreatment are disturbing.

A black and white mobile of Alexander Calder was transformed into a green and yellow stabile. After his death, public opinion forced the return of the masterpiece to its original state, but such issues should not be left to chance or a public vote.

Alfred Crimi, who is here today, brought a legal action when his fresco in Rutgers Presbyterian Church was obliterated, but he lost the case.

S. 2796 incorporates protections similar to those provided in many European countries and the States of Massachusetts, California, and New York. It would subject individuals who maliciously alter or mutilate works of art to the full civil penalties available under copyright laws for copyright infringement. These additional statutory protections are essential in order to safeguard artists reputations and the integrity of their artistic expression.

The third component of S. 2796 permits artists to share in the increases in the economic value of their work. In this respect, the bill expands and improves on previous legislative efforts to bring visual arts into parity with literary and performing arts. S. 2796 directs that a 7 percent royalty, based on the appreciation in value of a work, shall be paid to the artist when a work is resold for at least 140 percent of the price paid by the seller.

The economic rewards of artistic success should not be reserved solely for speculators and patrons of the arts. They should also be shared with the creator, as is the case in many other areas of creativity. Excellence in art should be rewarded, just as excellence in other aspects of accomplishment is.

The hearing today is intended to address these issues and to assess the effectiveness of the legislation in achieving these goals. As President Kennedy once said:

> There is a connection, hard to explain logically but easy to feel, between achievement in public life and progess in the arts. The age of Pericles was also the age of Phidias. The age of Lorenzo de Medici was also the age of Leonardo da Vinci. The age of Elizabeth also the age of Shakespeare. And the new frontier for which I campaign in public life, can also be a new frontier for American art.

With this legislation we confront the new frontier for American art. I am pleased to begin its exploration today, and I intend to press this legislation in the next Congress.

I thank each of the witnesses for sharing their time and expertise with the subcommittee, and I look forward to their testimony.

[The text of S. 2796 and explanation of the bill follow:]

II

99TH CONGRESS
2D SESSION

S. 2796

To amend the copyright law to secure the rights of artists of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 9 (legislative day, SEPTEMBER 8), 1986

Mr. KENNEDY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the copyright law to secure the rights of artists of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Visual Artists Rights Amendment of 1986".

SEC. 2. Section 101 of title 17, United States Code, is amended by—

(1) inserting between the paragraph defining "created" and the paragraph defining "derivative work" the following:

"A 'critical embodiment' as applied to a work of fine art within the category of pictorial, graphic, and sculptural works is one or more of (1) the only copy, e.g., a painting or a sculpture; (2) one of a specifically limited class of copies, e.g., one of a limited edition of fine prints; or (3) a master from which copies can be made, e.g., a mold or photographic negative.";

(2) inserting between the paragraph defining "pictorial works" and the paragraph defining "pseudonymous work", the following:

" 'Price' as used herein, is the aggregate of all installments paid in cash or in-kind for a work.";

(3) inserting between the paragraph defining "publicly" and the paragraph defining "sound recordings", the following:

" 'Sale' and 'resale' as used herein, shall include transactions essentially equivalent to a sale including long-term lease, lease-purchase arrangements, and the like."; and

(4) inserting between the paragraph defining "widow" and "widower" and the paragraph defining

"work of the United States Government", the following:

"A 'work of fine art' is a work of recognized fine art stature. In determining whether a work of fine art is of recognized quality, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art. Evidence of commercial exploitation of a work as a whole or of particular copies, standing alone, does not preclude a finding that the work is a work of fine art.".

SEC. 3. Section 106 of title 17, United States Code, is amended by adding "(a)" before "Subject" at the beginning of the section and adding at the end thereof the following:

"(b)(1) Independently of the artist's economic right in copyright in a pictorial, graphic, or sculptural work of fine art, the artist shall have the right during his life to claim authorship of his works which are publicly displayed or to disclaim authorship of such works because of any distortion, mutilation, or other alteration thereof. This right shall not apply to works made pursuant to contract for trade or advertising use.

"(2) Upon the death of an artist, his estate shall have the exclusive right, up to 50 years after his death, to exercise the rights granted to the artist in paragraph (1) of this subsection.

"(c) Subject to the limitation in section 113(d), the destruction or significant or substantial distortion, mutilation, or other alteration to the critical embodiment or totality of a pictorial, graphic, or sculptural work caused by an intentional act or by gross negligence is a violation of the exclusive rights of the copyright owner where the creator of the work is the copyright owner. Where the artist is not the copyright owner, he shall nonetheless have the exclusive right during his lifetime, and his estate shall have the exclusive right for up to 50 years after his death, to assert infringement of the copyright by distortion, mutilation, or other alteration.

"(d)(1) Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay to the artist or to the artist's agent, a royalty. Where the artist is deceased at the time of the sale, and the sale occurs within fifty years after the death of the artist, such royalty shall be paid to the National Endowment for the Arts for use in the visual arts program. Such royalties shall be in addition to and not a substitute for, appropriated funds for the Visual Arts Fellowship program. Such royalty shall be equal to 7 percent of the difference between the seller's purchase price and the sale price or the fair market value of any property received in exchange for the work. The right of the artist to receive this royalty may not be waived. An artist may assign the right to collect this royalty payment, provided however, such assignment shall not have the effect of creating a waiver prohibited by this subsection. Failure of a seller to pay the artist a royalty due under this section shall constitute an infringement of the copyright.

"(2) Paragraph (1) shall not apply to the following:

"(A) The resale of a work for a gross sales price of less than $500, or in exchange for property with a fair market value of less than $500.

"(B) The resale of a work for a gross sale price of less than 140 percent of the purchase price paid by the seller.

"(e) Any artist seeking royalty payments for the sale of his work must register with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation.

"(f) All sales or other transfers of pictorial, graphic, or sculptural works by registered artists must be registered by the seller or transferor with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation. For transfers involving sales or exchanges, such registration shall include the title of the work, name and address of the buyer and seller, the date of sale, the seller's purchase price, and the sale price or fair market value of any property received in exchange for the work.

"(g) Failure of a transferor or a seller of a pictorial, graphic, or sculptural work by a registered artist to register such transfer or sale with the Copyright Office shall constitute an infringement of copyright.".

SEC. 4. Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d)(1) If a pictorial, graphic, or sculptural work of recognized quality cannot be removed from a building without distortion, mutilation, or other alteration of such work, the artist's rights under subsections (b) and (c) of section 106, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, in the applicable State real property registry for such building, prior to the installation of such work, shall be deemed waived. Such instrument, if recorded, shall be binding on subsequent owners of such building.

"(2) If the owner of a building wishes to remove a pictorial, graphic, or sculptural work of recognized quality which is a part of such building but which can be removed from the building without substantial harm to such work, the artist's rights under subsections (b) and (c) of section 106 shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within ninety days either to remove the work or to pay for its removal. If such work is removed at the expense of the artist, his heir, legatee, or personal representative, title to such work shall be deemed to be in such person.".

SEC. 5. Section 401 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d) The provisions of this section shall not apply to pictorial, graphic, or sculptural works of fine art.".

SEC. 6. The criminal penalties provided by section 506 of title 17, United States Code, shall not apply to infringement of the rights created in section 106 (b), (c), and (d) of such title.

SEC. 7. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

○

THE VISUAL ARTISTS AMENDMENT

I. GOALS

The bill improves copyright protections for visual artists. It recognizes the implicit originality of individual works of fine art, the public benefit of encouraging a creative environment for artists to work, the national responsibility to enrich and enliven our cultural heritage.

II. SYNOPSIS

The bill has three major components:

NOTICE: for works of fine art, delete the requirement in current copyright law that a copyright notice appear on all works for which copyright is claimed.

RIGHTS: prohibits intentional distortion, mutilation, or destruction of works of art. Allows artist to claim authorship of his work, or disclaim authorship if the work has been distorted. Remedy is the same as for other infringements of copyright, but there are no criminal sanctions. A work of art which is part of a building is not covered, unless the artist expressly reserves his rights at the time of commission.

RESALE ROYALTIES: requires payment to the artist of 7% of the difference between the purchase price and the selling price of a work of art which is resold. Royalty payments are applicable to sales in excess of $500 and when the value of the work increases by at least 140% -- during the lifetime of the artist and within 50 years of his death. Artists seeking royalties must register with the U.S. Copyright Office. All sales of works of art must be registered with the Copyright Office. Where an artist cannot be located or is deceased, the royalties are to be paid to the National Endowment for the Arts, Visual Artists program.

III. APPLICATION

The bill applies to:

-- original works of fine art, e.g. paintings, sculpture, pictorial works, including serigraphs and other work done in limited edition series.

-- it applies only to works of "recognized quality."

-- works of fine art done under commission would be covered since copyright does not usually transfer with the actual work.

Exclusion from the bill:

-- "work-for-hire" pieces are not covered since authors in these cases transfer the copyright along with the work.

-- work attached to buildings are not covered unless the artist expressly reserves his right in contract at the time of execution.

American Council on the Arts, Artists Equity. Graphic Artists Guild, Boston Visual Artists Union, Visual Artists and Galleries Association all suport the bill.

Senator **Kennedy**. We have now five panels and a limited period of time. We have to adjourn at noon time today, so we are going to ask all of the witnesses if they would be good enough to submit their testimony and to make whatever comments that they would for the subcommittee. The full testimony will be printed in its entirety in the record as read, and will give us more of an opportunity for questioning, which I think is helpful in making this particular case.

So, we will start off with the first panel: John Raimondi from Boston, MA, Alfred Crimi from New York accompanied by Tad Crawford, and Larry Rivers. And I think it is only appropriate that we start off with Alfred Crimi. Mr. Raimondi is not here yet.

STATEMENT OF ALFRED CRIMI, ACCOMPANIED BY TAD CRAWFORD, FROM NEW YORK; AND LARRY RIVERS, FROM NEW YORK

Mr. **Crawford**. Thank you, Mr. Chairman.

My name is Tad Crawford. I am speaking today on behalf of Mr. Alfred Crimi, who is sitting on my left, and a photograph of whose mural is behind the panel. Mr. Crimi's statement reads:

My name is Alfred Crimi. This moment represents 40 years of hope and aspiration for me since I sued the Rutgers Presbyterian Church on a moral rights issue in 1946. And now, finally, to see a bill being sponsored to protect the rights of authorship nationwide.

It would give me immense pleasure to present my testimony to you myself, but at my age my memory plays little tricks on me, and so I have delegated my friend, Tad Crawford, to read it for me.

As an artist whose 800 square foot mural was destroyed without being consulted, I am naturally concerned about visual artists rights.

A work of fine art is not a replaceable commodity that can be duplicated. It is a one of a kind creation expressing the spirit and mood of the time of its conception and the psychological characteristics of the mind that conceives it. It is an inner expression of the soul that transcends physical appearance. Once destroyed, its spirit cannot be recaptured, not even by the artist who conceived it. Because of its very nature, a work of fine art is a precious expression of the heart and mind of the artist and should be protected.

A mural in a public or semi-public institution where public interest is invited becomes a part of the patrimony of the community. In my case, it was a place of worship where my signature was required by the client as part of the contract, and, as such, a passport to success for the artist.

The Rutgers Presbyterian Church went to great lengths to secure the best available talent in the country, after rejecting plans by various church decorators, and decided to hold a competition.

After my return from a summer vacation in 1946, while waiting for a bus on 42nd Street and Fifth Avenue, I felt the tap of a hand on my shoulder; it was the hand of a classmate I had not seen for several years. During our brief conversation, he asked me if I knew of a certain person, a member of the board of trustees of the Rutgers Presbyterian Church. The name was not familiar to me. When this person discovered that my friend was an artist, and that he knew me, he wanted to know what pigments I had used on my fresco mural. They had tried to wash off the paint and it would not come off. This made me apprehensive, and I decided to visit the church. When I arrived, my fears were confirmed. I had been in the habit of stopping off at the church every so often to see how the fresco was holding up, and had always been received with deference and respect. This time, the sexton told me he had been given orders not to allow anyone in the church. I asked to see Dr. Daniel Russell, who had conceived the idea of decorating the chancel wall with a mural. The sexton informed me that Dr. Russell had retired and that Dr. Key was now the minister.

When I met Dr. Key and introduced myself, he said abruptly as though prepared for such a visit, "I am sorry, Mr. Crimi, your mural has been painted over." "I can't believe it", I exclaimed. I felt as though I were coming out of a steam bath and slowly being submerged in an icy pool of water. "The main objection", Dr. Key continued, "was the nakedness of the chest of Christ." When I asked to see under what shroud the decorators had buried the corpse, Dr. Key said they could not allow anyone in the church until the decorations were completed.

I cannot describe the trauma that gradually overtook me. I could not believe that it was possible, in the 20th century, that such bestial mentality existed. The commission had been awarded through national competition, and not to the lowest bidder.

Compelled by the injustice that had been perpetrated, and the hypocrisy on the part of the board of trustees, I sued the church. Had I not done so, I could never have touched a brush again.

This story is too long and complex to be told in full at this hearing. However, in conclusion, I must emphasize that according to the present law, after the artist has been paid for his work, he has no legal rights or recourse, should his work be vandalized, plagiarized or destroyed. Nor does he have moral rights of ownership in perpetuity, to protect his work, his name, and reputation. It is only when the visual artists rights have been legally established that the artist can contract with the client on an equal basis.

I thank the subcommittee and Senator Kennedy for the opportunity to make this statement.

Senator KENNEDY. We want to thank you very much, Mr. Crawford and Mr. Crimi for that brief, but very comprehensive statement, which I think illustrates the compelling need for this type of legislation. We are hopeful that the legislation will deal with this very kind of a problem. Obviously that is our goal, and we will have comments during the course of the morning to help us make sure that it does.

I think this injustice is a timeless one. It may have taken place in years past, but it is one that cries out for action at this time. And I know we are going to hear other examples for the need of this legislation, but I think your presentation here underlines the compelling need for us to take action.

Now, as I understand it—and I just want to make it as clear as we can—under the existing laws of copyright, you were virtually powerless to try and seek restitution or removal of this work of art, which is a reflection of your artistic creativity and capacity. As I understand it now, you are really powerless to do anything about this situation.

Am I correct?

Mr. **Crawford**. That is correct, Senator Kennedy. That has been Mr. Crimi's experience in both his litigation and all of his attempts to have the work preserved or removed in some way.

Senator **Kennedy**. The goal, then, is to provide an opportunity to have the work either removed or preserved. As we understand it, the existing interpretation of the law virtually prohibits that kind of action and that kind of relief.

I want you to know that we value very much this opportunity to have your statement and have your testimony. We will be hopeful that we can try and deal with the injustice which you have described.

We are thankful to you.

Mr. Rivers, we are glad to have you here this morning participating in our hearing.

STATEMENT OF LARRY RIVERS

Mr. **Rivers**. Thank you.

I was sick and I haven't had a chance to recover and prepare as much as I would like. I could say something to begin with, but I actually thought if you had some questions that you thought my experience would help toward the passage of these laws, I would be glad to answer these questions.

I did want to say that the idea of having the artists share in the continuing onward and upward of their art, I think is a good idea. It is hard to pursue something that seems animated by a selfish motive—like the fact that works of art that sold on the market or in a gallery or whatever would continue to bring funds to the artist. It sounds like any artist would be for it because it is more money in the coffers, and it sounds natural that it would be attractive.

But I thought that there were really other reasons to support the legislation. I thought that by putting into law—by institutionalizing an idea—that the country would stand for something more than it stands for now. For a long time, I suppose that America stood for settling the west, free enterprise, and business. As I believe Australia is that today. We have passed on to something else. And I think that probably it is about time that we began to express in law some of the things that actually exist in feelings in this society.

I haven't had the profound experiences that some other artists, like Jasper Johns, have had. He has sold a work for a few hundred dollars and a decade or two later it is worth $1 or $2 million. Not that Jasper is poor, but it would seem to me that the whole country would see it in another way if it was a public issue and when the man who bought it felt as if it had some relationship to the country and the laws that were passed—that it was part of our society. So, that is one of the reasons that I thought that the bill should be passed.

Just as with education, for instance, people are paying for education that are no longer sending their children to school. And at the same time, it doesn't feel that freakish to do it. There seems to be something that is natural about the country that says that everybody should pay for it, or that in some way, everybody benefits by it. And I think that by passing a law that when art at an auction, or otherwise, is passed along from one person to another, that a government policy makes it a public thing. It is no longer just a thing that an artist does in his studio for his own selfish interest and passion, but that it actually must have meaning for the rest of the country.

So, that was one of the things that I thought.

Senator KENNEDY. Let me ask you, were you under contract, for example, with Esquire Magazine, when you did works of art for that magazine. They altered or changed, and I understand, put a jingle on your work.

Now, how do you react to that?

Mr. RIVERS. Are you talking about Vanity Fair?

Senator KENNEDY. Yes.

Mr. RIVERS. Just to review it for a second, Vanity Fair called me up in the guise of Leo Leherman, who is sort of an "interesting human being", and he asked how would I like to see the Statue of Liberty—this was maybe 2 years before it was transformed into this supposedly magnificent statue it is today—and he asked how would I like to see it. So, I took it very seriously, and I actually sent in about five drawings—fairly good size drawings. And one or two of them were actually the Statue of Liberty in the shape of the United States, but you saw the arms. Some thing that I thought was funny about it—and sort of true for a moment about it—that I don't know if people see the Statue of Liberty as a woman as much it seems to be about the United States.

And the next thing I know is that no one gets in touch with me. They paid for it—I agree with that, they did pay what they were supposed to. But they reproduced only one of the works—not in a series as they said. It was about that big [indicating], and next to it was a kind a stupid dogrel that someone compared—I guess I lost my sense of humor—the Statue of Liberty to some kind of disco. Something that struck me as being not anything I had done—not that I am a snob, but I want my work to be. It was as if I illustrated this silly poem.

And I finally lost my temper, and I was told that there really wasn't that much that I could do according to the law. Maybe we lost our nerve because the first judgment of it was given by a judge who acted as if the case were weak. And we did get some restitution—not enough to make up for that. And as a matter of fact, I will just tell one little anecdote: The editor of Art In America saw it, and said, "Are things that bad?"

So, I just feel as if as things got to be more and more recognized, the role that art plays in society, even in commercial life or in illustration, that that probably wouldn't have happened, or they would have been more careful. And I think everybody would have been happier.

Senator KENNEDY. The point is how do you think that affected your reputation?

Mr. RIVERS. How do I think it affected my reputation—I think for a moment those who looked at it probably wondered what the heck is happening, or at least that was my fantasy. I think it did actually if the editor of Art In America told me that——

Senator **Kennedy**. And you had no awareness, obviously, that it was going to be used in that particular way?

Mr. **Rivers**. No, no.

Senator **Kennedy**. And can we conclude that you wouldn't have done it if you knew that it was going to be used in that way?

Mr. **Rivers**. That is right.

I don't know why they didn't get in touch, or why they felt no compunction about it.

Senator **Kennedy**. And that wasn't explained to you at the time that they made that request.

Is that right?

Mr. **Rivers**. That is right.

It was represented as a pictorial series of what I thought I would like the Statue of Liberty to look like.

Senator **Kennedy**. Well, this is again the type of situation that we would hope to be able to address with this legislation.

Let me ask you, on the question of the future royalty—we find out that in other areas of creative arts, those future royalties are generally recognized under copyright law. Should artists be denied that kind of participation as well—in terms of future royalties?

Mr. **Rivers**. Excuse me?

Senator **Kennedy**. Should they be permitted to participate in the increased value of their work?

Mr. **Rivers**. Yes.

That was my first speech. I thought that they should.

Senator **Kennedy**. Sometimes all the Members of the Congress and Senate won't read the whole speech, but they will read your answer—sometimes they don't read our whole speeches either. (Laughter.)

Mr. **Rivers**. The thing is—and I imagine it is going to be read by people in Congress—I know the problems that could exist in relation to a question like this because I would naturally be for something which would be a gain, which looks like a gain for the artist. As the work goes up in price, the artist makes a few bucks. In really thinking about it seriously, I think it is the institutionalizing—the role of art in the country which is important. Finally, as you said, it is something that exists in other countries. I think that there are different ways to step into the future, if I may say. It is really intesting that you take an interest in this. It seems as if it is not front page news, yet I think it is a good idea.

Senator **Kennedy**. Let me ask you this: There will be those who say that the artists do well enough under contractual agreements, why should they participate in the increased value? If the value of their art goes up, then the next time they come to be commissioned or to contract, then they will be able to get more in terms of that contract. They say then that is really fair enough and that is really the way the free enterprise system functions.

What is your best answer to that?

Mr. **Rivers**. Without being able to pinpoint it exactly unfortunately, I think there is something in the country which talks about fairness from time to time. It doesn't really seem fair that if something starts out at that rate, through a series of events and things like that, sells for a very high price, the artist doesn't share in it. I really think to bring him into play is important—not only that, but also I think there is an awareness that there is an art role in this too. That the work had to be created.

The way it goes now, it seems as if it is all about real estate, and that it wasn't even done by anybody.

Senator KENNEDY. And obviously, there is a distinction, I suppose, in terms of the creativity between the creation in some works of art. Maybe the artists would move into other mediums, interests, or other types of painting or drawing—as in this case—that they may want to do as a creative person. But for one reason or another, it may not have the same potential dollar value.

Mr. RIVERS. Also, there is a fact that I am not sure is understood in public life, but there are artists who get a lot of money for a work they did 20 years ago—and that actually happened just recently. They are not starving, but they are struggling.

Senator KENNEDY. I think that we are going to hear other examples of it. We are familiar with cases such as you mention and I think that is a very powerful factor as well.

Well, I appreciate your willingness to come here and share your views on this. We are going to be continuing to work on the legislation, and we hope very much to be able to call on all of you for additional help as we move through. I thank you very much.

Mr. RIVERS. OK, thank you.

Senator KENNEDY. All right.

We will go to the second panel: Irving Sandler of the State University of New York, Purchase, N.Y. and Rosalind Krauss, the City University of New York.

[Pause.]

Senator KENNEDY. We will start off with Rosalind Krauss if that is all right.

STATEMENTS OF ROSALIND KRAUSS, CITY UNIVERSITY OF NEW YORK; AND IRVING SANDLER, STATE UNIVERSITY OF NEW YORK

Ms. KRAUSS. I am Rosalind Krauss, professor of the history of art at the City University of New York; editor of October Magazine; author of "Terminal Iron Works: The Sculpture of David Smith", and the catalog résumé of David Smith's sculpture.

My support for the present bill, particularly its copyright provision, derives from my wholehearted agreement with the logic behind fine arts legislation. That logic, we could say, is a determination to create an exception to the principle of private property, by allowing an artist to sell an object, yet retain aesthetic control over it. A determination which is in turn undergirded by the idea that art transcends the condition of other physical objects because it is somehow the property of a culture. It is our heritage, our patrimony, and its condition is not to be left in the hands of a single owner who, under the terms of private property might change it, cut it up, throw it away, or whatever.

That such owners do change or destroy works can be documented by myriad cases, just one example being that of the work of David Smith, an artist who in the opinion of many experts was the greatest American sculptor of this century. In 1960 Smith published small notices in Artnews and Art In America disowning a sculpture of his that, he had come to learn, had been stripped of its paint during a resale transaction. Although this statement denying henceforth of his authorship of this object was a brave gesture, it was an entirely unenforceable one given the existing laws. The present legislation would have given Smith the right either to prevent this from happening or to seek damages in the event that it already had.

Now, Smith's adamant stance over the issue of his painted sculpture is all the more poignant in view of the fact that, about 10 years after his death, this very question became the center of a scandal when it was learned that in the early 1970's several of his large-scale sculptures had been stripped of their paint by order of the executors of his estate. While the present legislation would not, of course, be able to restrain an artist's heirs from tampering with his or her work, it might in this case have established so forceful a precedent—via Smith's lifetime assertion of his own conception of his art—that the heirs might have drawn back from the step they were to take.

Now, it is because of my very belief in what I have called the logic of intellectual or cultural heritage that I would like to develop this conception a bit further in the context of legislation that would broaden the extent and effect of copyright on works of art. This logic, at variance with that of private property, this thing that we might call instead the logic of intellectual property, connects up with that set of practices by which visual culture is experienced at all. I am speaking here of museum exhibitions where art is shown and written about in catalogues, or about critical journals or scholarly books on art—in short, all those practices of written response which we could call the discourse on art.

Now, this discourse on art is dependent upon the possibility of supporting its arguments or theories or findings with reproductions of a work it is discussing. The idea that argument be supported by examples, and that serious discussion have a right to that example, forms the rationale behind the constitutional conception of "fair use", whereby a certain exception is made to copyright. Fair use makes quotation of a tiny fragment of a total written work available to another writer for scholarly or critical purposes, and this quotation may be performed without obtaining permission or paying royalties to the copyright holder. Behind fair use is the understanding that unimpeded access to the work for these purposes is a basic freedom without which an open society's speech would become increasingly muffled or trivialized, or both.

The Fair Use Doctrine does not, however, extend to works of visual art. This is because the concept of the fragment does not transfer to the reproduced image of a painting or sculpture, since to reproduce such an object is to reproduce all of it, no matter how reduced in size or visual impact. The artist as copyright holder is, therefore, in a position somewhat different from that of the novelist or poet and this asymmetry has led to what are, I believe, a set of extremely detrimental practices that fine arts legislation—especially that extending effectiveness of copyright—should address.

Specifically, agencies have been formed—the one in France is called SPADEM; the one here is VAGA—to act on behalf of artists to enforce copyright and collect royalties for each reproduction of their work. When such enforcement permits an artist to control the commercial exploitation of his or her work—the production of Picasso tee-shirts, for example, or the case that Mr. Rivers just told us about—everyone would agree that this is a good idea.

But most often, this right to royalty involves the collection of large sums of money from the practitioners of the art discourse: the critics and scholars who are part of a cultural circulation of the work. In France the result of this has been two-fold. First, it has meant that small, serious publishers of art books cannot afford to publish works on contemporary art—leaving the field to large, slick, commercial firms. And that serious scholars who have spent years of their lives working on texts of a given artist are forced to relinquish their own royalties and hand them over to the estate of the artist in question. A recent example of this concerns the Matisse estate. The second is the simple refusal of heirs to allow reproduction at all should they not like the interpretation of a given critical scholar. Giacometti's widow has recently exercised this right.

The answer to this problem, I think, would be to amend the existing Fair Use Doctrine to include works of art reproduced for critical or scholarly purposes. Not being a lawyer, I don't know the problems this might raise. But I do know that there are serious consequences from which the cultural dissemination of works of art even now suffers, in not thinking through the logic of transfer of copyright—for reproduction is part of copyright.

I realize that what I am raising here is tangential to the present legislation as framed, but conceptually, it is closely related. Therefore, I urge the framers of this bill to add this small, but needed, protection. And I thank you for the opportunity to address the panel.

Senator **Kennedy**. Well, I appreciate the points that you have raised here. As you pointed out, this one is a very legitimate issue and question which the copyright law does not address.

We will be glad to take a look at the recommendations that you made. We have really targeted on the moral rights issue and the other provisions. It is an area that should be addressed, and it ought to be addressed by the Congress—whether we can include it in this particular legislative effort is something that we will have to give careful consideration to, but we will be glad to work with you and see what can be done.

Ms. **Krauss**. Thank you.

Senator **Kennedy**. Mr. Sandler.

STATEMENT OF IRVING SANDLER, STATE UNIVERSITY OF NEW YORK

Mr. **Sandler**. I am a professor of art history at the State University of New York in Purchase. My field is contemporary art, and I have written a number of books—among them, "The Triumph of American Painting: A History of Abstract Expressionism", and "The New York School: Painters and Sculptors of the Fifties". I have also served as chairman for the visual arts overview committee of the National Endowment for the Arts, and I am a contributing editor to Art in America and on the editorial board of the Art Journal.

I first became interested in art and the law when a construction by David Smith, arguably our greatest American sculptor, was desecrated. Its owner had removed the paint. All Smith could do was to disown the work by writing letters to art magazines announcing that the work was worth only the cost of its materials. Smith then tried to get legislation introduced into Congress protecting the integrity of the work, claiming that it had to be treated as a special kind of object—a special kind of property. Smith's feelings on this matter did not prevent the subsequent desecration of his art. I remember, too, Smith's anger when an heir of another famous sculptor had his welded metal constructions duplicated in bronze casts and sold as originals. They were only reproductions, said Smith, not originals. But there was no law on the matter.

Recently I was at a social gathering talking to a group of lawyers from a distinguished New York law firm. The topic of art and the law came up in conversation, and I told of the case concerning the painting that had won a prize in an exhibition. The owner, as well as the painter, claimed the prize money. I then asked who should have received it. The lawyers unanimously opted for the owner—after all, the picture was his property. Even after I pointed out that the prize was being awarded for the creation of the work, not the purchase, a few of the lawyers held out for the collector. And I think that Larry Rivers was talking a little bit about this sort of situation when he called for some recognition of the artist.

It is high time that Federal law acknowledge that a work of art is not just a piece of property, like a chair or a table, to do with as its owner would, at least it ought to possess the status of a dog or a cat. We have laws prohibiting cruelty to animals. We ought to have laws prohibiting cruelty to works of art.

This would certainly be in keeping with the sentiment of President Kennedy. He said in 1963: "I see little of more importance to the future of our country and our civilization than full recognition of the place of the artist."

My point is that an artist has a residual interest—a residual right in his or her work of art—in maintaining the integrity of the work, and in sharing in the future increases in its value. And the public also has residual rights, that is why so many nations restrict the export of national treasures. And the residual rights ought to be spelled out in Federal legislation. The Kennedy bill is a commendable start.

Thank you.

Senator KENNEDY. Thank you.

Let me ask—how widespread is the desecration, or the kinds of alterations which we have talked about briefly here this morning? I am sure there are many other examples. I think we know about the celebrated cases, but how widespread is it, do you believe?

Mr. SANDLER. I would be hard put to say. We all know of cases, and some of them—I remember, for example, a mural of James Brooks, one of the truly great monuments of the 1930's was pulled down—a WPA mural—because the building was being renovated. And luckily, the mural was saved because the contractor remembered that his friend was an art collector and asked if he would just take the mural after it has been junked. And he decided he would put it up in the lobby of one of his buildings. He was going to cut out a little piece of the sailboat for his kids room until I got a hold of him and told him, "You may have a national treasure here—hold on to it." But who owns that mural?

I mean, does the guy who got it, or is it still in the possession of the Federal Government? James Brooks—what case does he have? It is all up for grabs, and yes, these things do happen.

Senator **KENNEDY**. How important is this issue, do you think, to the artists themselves? I mean, these various works of art are contributions to the whole artistic creative element in terms of our society—how important are the issues of paternity and integrity of these works?

How important is that to the artist?

Mr. **KRAUSS**. In the David Smith case, which is the one that I am very familiar with, this is the man who wrestled for 30 years with a certain issue, which had to do with polychrome sculpture. He was enormously committed to this as a problem. He did not believe that he had successfully resolved, but it was in a sense his intellectual struggle—his aesthetic struggle.

I think, had he known that the paint had been stripped from his art after his death, it would have been for him cruel—a kind of erasure of what he had done—what had occupied him for 30 years. This kind of thing cannot happen, or, I think, can happen certainly in a very different way with works of writing. But works of art are very fragile in that sense. And you can just erase what someone believes their art to have been about—as happened with Smith.

Mr. **SANDLER**. I'd like to say that I guess the way we find out is when works are actually desecrated, and one gets the response—the hurt and angry response of the artist—I believe in every case when this happens.

I know in the case of Smith, just to corroborate what Rosalind Krauss has said, he once told me that he painted 17 coats of a single white before he got the proper white that he wanted. And someone later comes along and just strips it off because they like the work better without the polychrome, and, of course, the artist is going to be terribly upset.

Senator **KENNEDY**. Do you think that the creation of the moral rights in law would affect the artistic community?

Mr. **KRAUSS**. Yes.

Once more, the David Smith case, I think, is an interesting example, because when this happened a group of people wanted to sue the perpetrators of this and enjoin them from doing anything further. And they wanted to take a class action, the class being the art world. So, there was some sentiment among a broad group of the art world that this work belonged to them, and that they felt themselves to be entrusted with this important body of work. So, I think in fact it is both the artist and the art world, plus whoever else believes in something else called cultural or national patrimony.

Mr. **SANDLER**. At its very least, I think it would affirm the interest of the public through its government in what happens to its art.

Mr. **KRAUSS**. And it is the same logic as landmarks preservation.

Senator **KENNEDY**. OK. Thank you very much.

Mr. Raimondi is here now if he would be good enough to join us now. We are glad to have you here with us.

STATEMENT OF JOHN RAIMONDI, BOSTON, MA

Mr. RAIMONDI. The pleasure is mine, Senator Kennedy.

Senator KENNEDY. We get a chance to visit up in Massachusetts, but we are grateful for your coming down here and testifying.

Mr. RAIMONDI. As a background, I would like to note that I have been an artist by profession for more than 15 years, and have been exclusively self-supporting from my art works throughout my entire career. I have fabricated more than 22 monumental sculptures and have completed more than 200 small scale works for corporate, private and museum collections across the United States and in several other countries.

In many ways I am acutely and accurately aware of the business of art. At first, I represented my own career, but now I share these responsibilities with a number of art galleries in different regions of the country. I have served as a gubernatorial appointment on the Massachusetts Council to the Arts and Humanities, and I would like to begin by giving my enthusiastic and unconditional support of the first two components of the bill.

The first: Deletion of the requirement that a copyright notice appear on all works is an action I wholeheartedly applaud. It drives me crazy to have to affix a little "c" and a circle on the face of every small sculpture or monumental work I produce. I probably wouldn't even sign my sculpture if it weren't for the pressures of the commerical art market and the expectations of clients and dealers demanding my signature. Since I go through the effort to register my art works, which are inherently mine by creation and relatively easy to protect by virtue of the fact, I see no reason that I should have to alter the work in any way by having to affix this notice to the front, back, side or any other place of the art work. The copyright notice itself is a visual, and for that reason immediately conflicts with the visual artist's intentions.

If, for example, the copyright notice were audio and thus forced Diana Ross to sing the notice, "Touch me in the morning"—by the way this is copyrighted 1976—you see my point—you might better understand how offensive this requirement can be.

I wholeheartedly applaud the second component of the bill which deals with the intentional distortion, mutilation and destruction of art works.

In 1977, I was commissioned through a national competition to produce a monumental sculpture for the Blue Cross/Blue Shield new headquarters building in Milwaukee, WI. I was unanimously awarded this prestigious commission from a diverse jury of arts, corporate and community representatives. I signed a contract to produce a 36 foot tall, 9 ton steel sculpture. Shortly after the contract was signed, I learned that their president was considering having the sculpture painted Blue Cross/Blue Shield blue. My sculpture—a work I had specifically designed for the site in weathering steel to interact with the concrete and black glass building was to be painted blue! I was outraged.

In reality, however, the sculpture was no longer mine. There was no legal remedy I could use to protect my creation. Fortunately, I was able to convince the president of the integrity of my work as designed, but should they decide to paint the work in the future, I have no protection until this provision is ratified.

Finally, I feel uncomfortable with the third component of the bill. That is dealing with the resale royalties. I think the action is an administrative nightmare, and I think it is unenforceable. No one is holding a gun to my head when I sell a work of art. I think the laws of supply and demand will always prevail. Certainly there are times when I need money and discount my work for quick payment. But if a client buys a work and it appreciates significantly, my career and any new work I create is benefited by the resale of the work regardless of any royalties I receive.

I think the specifics of the bill are too far-reaching and cumbersome. The figure and rate proposed, $500 and 140 percent increase, are too low and encompass virtually all of the transactions in the art world, most of which are for works of decoration which are not created by serious artists—in that price category. A $5,000 and 200 percent limit would probably eliminate 95 percent of the needless paperwork the bill would create. I don't believe that the Federal Government has any right telling me who to leave these royalties to after I die. Many artists will especially object to the bequest of these royalties to the National Endowment for the Arts, an agency that throughout their lifetime has ignored their works by not granting them any fellowship awards.

Although the NEA's overall mission is beyond reproach, I believe the judges for panels are called from very narrow cross sections of the art world so that the awards seem biased toward fads and current perceptions of the avant garde, rather than toward real artistic merit.

Thus, many real artists who surface and rise beyond the contemporary fashion of the times, lack the patronage which the Endowment is offering. In summary, even though I emotionally support the royalties provision, it seems to be an administrative nightmare and totally unenforceable. I can think of dozens of ways in which people will avoid paying this tax—which I can discuss after this. But many of the complaints issued today, however, might be the same ones cited when the Federal income tax was first introduced earlier this century. Even though there are still people who can beat the system, but the majority have come to accept the law and pay their taxes. Similarly, there is a minority of art collectors and dealers who go out of their way to avoid paying state sales tax on works of art.

However, it is conceivable that under a new realistic and revised bill, the art market could readjust, and dealers would include and naturally accept artist royalties and increased administrative costs related to them and reflect them in their prices. But I don't think that all the details are worked out in the current proposal.

Thank you very much for your time and attention.

Senator KENNEDY. Thank you very much. You have certainly raised some interesting issues and questions with regard to part 3. We have tried within the Copyright Commission to provide at least some mechanism to be able to achieve that. We know that from practical experience we have one State that is involved in this kind of a royalty compensation, and we will hear more on that issue later as we move through the consideration of the legislation.

We have similar problems, of course, with the music industry. That is another issue—but you have ASCAP and BMI that provide collection mechanisms for artists themselves quite efficiently. We are not experts obviously in these kinds of undertakings, and that expertise is what these hearings try and develop. So, we appreciate your comments on that provision.

Your success in preventing the distortion of your sculpture was really dependent I guess on your gratuitous knowledge of the planned painting, and I am interested to know whether you believe that the right of the integrity is really too important to leave just to chance—whether it is essential that you have law so that you are going to be able to have that kind of prohibition?

Mr. RAIMONDI. I think it is extremely important, Senator, it would change the entire profundity of the work for me if the work were painted day glow orange, or blue, or any color. And when I have encountered this, I have told the executives of the corporations I was dealing with if that is what they want, then I will scratch what I have already designed and I will begin designing something from the initial step that will be painted blue or will be painted a particular color—but that is the artist's decision. It is not the landlord's decision, it is not the tenant's decision, it is not the corporate's decision. It is the artist's decision.

Senator KENNEDY. And part of your point is that it shouldn't be just left to chance whether somebody calls you—or any other artist in the country—and tells you that they are involved in changing the colors.

Mr. RAIMONDI. Right, because I have no recourse at that point.

Senator KENNEDY. That is true.

OK, well, it is a helpful current illustration of how you personally were threatened. I think it helps make the earlier point. And we look forward to continuing to work with you as we shake through the legislation on the latter point, point 3.

John, thank you, very, very much.

Mr. RAIMONDI. Thank you, Senator.

Senator KENNEDY. We have our third panel: Gus Harrow of New York, and Martin Bressler from New York; Professor Tom Goetzl, from the Golden Gate University Law School, San Francisco; John Koegle, who represents the Volunteer Lawyers for the Arts, New York.

Mr. Harrow, why don't we start with you.

STATEMENTS OF GUS HARROW, NEW YORK; MARTIN BRESSLER, NEW YORK; PROF. THOMAS M. GOETZL, GOLDEN GATE UNIVERSITY LAW SCHOOL, SAN FRANCISCO, CA; AND JOHN B. KOEGLE, VOLUNTEER LAWYERS FOR THE ARTS, NEW YORK

Mr. HARROW. I want to thank you, Senator Kennedy, for this opportunity.

As a lawyer and teacher, I have been involved in art-related issues almost exclusively for 15 years now. And I suppose that at the forefront of my issues and concerns has been the integrity of art, and in withstanding pressures to corrupt art. I think this bill makes a powerful stand in that direction.

I think it does so because it would have an historical influence that may not be apparent to those who are not artists, art historians, or critics. In establishing new fundamental rights for creators, it reaches the very creative process itself and it formulates a variation of a law which is now recognized in almost all nations in the western world, in the laws of some 63 countries internationally, and which has been codified in international conventions consistently in conjunction with copyright provisions.

I would like to address myself specifically to those provisions of the bill which provide artists with rights to withstand alterations and distortions, and which require recognition of authorship of their creations. Establishing these rights reaches toward the essence of artistic creativity and, as I indicated, is a necessary first step toward preserving artistic and cultural integrity. This is true because art is more than property. It is the expression of what an artist is and what society is.

It is not simply an object to be owned, rather, the creation expresses the artist's innerself, something which cannot be owned. And the best art symbolizes and expresses who we are as a people, a culture, and a nation. Consequently, the rules governing property as such are insufficient. This law would recognize the deep bond between the artist and his or her creation, and between art and cultural identity.

In recognizing the relationship between an artist and a work of art, this law responds to a different level of experience than an economic one. And it creates a personal right which is akin to the rights related to invasions of privacy, defamation, and free speech—rather than rights related to property. American copyright law, as presently written, does not recognize these rights since it emphasizes economic property interests rather than personal rights. This is the traditional concept, which does not stress the relationship of the artist to his creation, but rather the interest of society—a worthy interest. In encouraging creativity, the present copyright law gives the artist a limited—economic monopoly over his work. And thereby fosters creativity from society's point of view, rather than the artists.

The enactment of this bill would reflect in the emerging recognition in the United States of a concept which has long since taken root in European jurisdiction and in many countries throughout the world. This is the recognition of the intimate bond between the artist and his creation. And that it requires legal protection, as a personal right, which is distinct from rights accorded other chattels, or property interests—and which does not treat art as such.

I have many more things to say, and a few suggestions as to some modifications in the legislative process, but I would prefer at this moment to respond to any questions that you may have.

[The prepared statement of Mr. Harrow follows:]

PREPARED STATEMENT OF GUSTAVE HARROW

This Bill has an historical significance which may not be apparent to many, other than artists and art historians. It would nationally establish certain fundamental rights of creators which are basic for artists and the creative process; and which are now recognized by almost all nations in the Western world and in the laws of some sixty-three countries internationally. In addition, these rights of artists have been codified in international conventions, where they are treated in conjunction with copyright provisions.

I am referring specifically to the provisions which provide artists with rights to withstand alterations and distortions of their art, and which require recognition of authorship of their creations.

The recognition of these rights reaches toward the essence of artistic creativity and is a necessary first step toward preserving artistic and cultural integrity. This is true because art is more than property. It is the expression of what an artist _is_ and what a society _is_. It is _not_ simply an object _owned_. Rather, the creation _is_ the artist, and the best art symbolizes and expresses who we are as a people, a culture and a nation.

Consequently, the rules governing property, as such, are insufficient. The law should recognize the deep bond between artist and his or her creation; and between art and cultural identity and achievement. This Bill moves in that direction.

My focus is on those provisions of the Bill, that establish two rights, which are commensurate counterparts. One is the right to prevent, and to be disassociated from, a work in public which is altered or distorted; the other is the right to be acknowledged as the creator of a work of fine art.

These commensurate rights, opposite sides of the same coin, recognize the intense meaning and importance that both recognition, and truthful presentation of works in public have for the artist, beyond financial considerations. It is the recognition of a value which is central for the artist and it establishes _personal_ rather than property rights. In recognizing the relationship between an artist and a work of art, this law responds to a different level of experience than an economic one; and it creates a personal right which is akin to rights related to invasions of privacy and defamation, rather than rights related to property.

Before his appointment to the Supreme Court, Louis Brandeis wrote:

> "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. ... It is immaterial whether (the mode of expression) is by work or by signs, in painting, by sculpture, or in music."

These provisions in the proposed legislation are not designed to directly or essentially further the economic interests of the artist, but the protection of his personality, creative spirit and the integrity of culture.

American copyright law, as presently written, does not recognize these rights since it seeks to vindicate the economic, rather than personal rights. This is the traditional concept, which should evolve.

The basis for these property rights is not the relationship of the artist to his work, but rather the interest of society in encouraging creativity. Copyright is a property right. It allows an artist (or one to whom he transfers the right) to prevent unauthorized copying, publishing, exhibition, or other use of his copyrighted work. In effect, the artist is given a monopoly over the use of his work.

As to this component of the Bill, in the United States (except for California, New York, Massachusetts and Maine), an artist can largely only protect himself if he can succeed in insisting upon contractual provisions; and few artists are in a bargaining position to do that. The need for distinct statutory protection is clear if the artist is to have his authorship and the integrity of his work respected.

Distortions of art —in all media— have repercussions on a number of levels. The perceptions and understanding of the artist, as well as the appreciation of art, are impaired or may be destroyed. The observer of distorted art experiences something different from the artist's conception.

This can result in the failure to experience art as enriching or challenging, and can cause one instead to perceive art as demoralizing or false. On the other hand, when compelled to acquiesce in distortions, artists' creativity can be dampened, blocked, or corrupted. On another level, to the extent that distortions proliferate, other functions —curatorial, archival, scholarly, and critical— are frustrated, made difficult, or entirely curtailed.

It is useful, to gain a clear understanding the impact of distortions in the visual arts, to compare them to distortions in literary works and other art forms.

An explicit literary example of the manner in which art both affects perceptions of experience and is conditioned or distorted by commerce is Stephen Crane's *The Red Badge of Courage*. This historical Civil War novel portrayed a unique concept of the experience and significance of war. When it appeared in 1885, however, *The Red Badge of Courage* was edited to dilute its gloominess in order to popularize it. A recently revised publication incorporates significant passages of the book which were previously omitted and as a result it comes close to being a different novel.

Similarly in a recent review of a television film *The Long Hot Summer*, billed as a "literary event" based on Faulkner's novel *The Hamlet*, it was observed that "any traces of William Faulkner have just about vanished."

In an analogous way, the historian Arthur M. Schlesinger, Jr., in reference to historical films, notes his concern about distortions of history and that these films tend to "express about the past the feelings we have about the present." Here issues of distortion and falsification are raised in the context of self-proclaimed reconstructions and interpretations.

The author of *Amadeus*, writing of Mozart's achievements, has concluded: "The best of them cannot be even slightly rewritten without diminishment."

The enactment of this Bill would reflect an emerging recognition in the United States of a concept which has long since taken root in European jurisprudence and in many countries throughout the world.

This is the recognition that the intimate bond between the artist and his creation requires legal protection as a personal right which is distinct from the rights accorded other chattels or property interests.

A word about the royalty provisions in the Bill. It is basic to the American system that initiators and innovators —people who think and feel for themselves— are to be recognized and rewarded. We encourage a fair investment return resulting from entrepreneurship and creativity — consistent with obligations to society. We should not do less for creative artists. The present Copyright Law recognizes this. A gap, however, remains concerning resales of visual artworks themselves — as distinct from reproductions, etc. This gap should be filled to place visual artists in parity with creators and artists in other areas and mediums.

Finally, I would make two suggestions for amendments of the Bill in the course of its legislative process.

First, I believe Sections 3 and 4 —with regard to the provisions concerning distortion, mutilation and alteration, but not as to destruction— should be applicable to artworks regardless of whether works are of recognized stature. The reason is that all artists ought to have the right to prevent misrepresentations of their art, and all artists ought to be credited as the creators of their works when publicly displayed.

Second, in Section 4, the burden of recording any future dispositions related to works in buildings, ought to be on the owner, not the artist. The reason is that the artist is almost always in a position of weak bargaining power and is far less informed about legal requirements than building owners. As a consequence the present language in the Bill would mean that artists generally would not be alerted to this requirement, and if they were, would probably feel pressured and compelled to accept the terms of the building owner, or the owner of the art.

Senator KENNEDY. All right.

We will continue with the whole panel, and then come back.

Mr. Bressler.

STATEMENT OF MARTIN BRESSLER

Mr. BRESSLER. My name is Martin Bressler, and I am an attorney and I am the founder and vice president of the Visual Artists and Galleries Association, Inc., an organization deeply involved in protecting the integrity of artists' work. V.A.G.A. is a membership organization consisting of 500 fine artists in the United States. It is the exclusive U.S. representative for like organizations in many European countries.

My friend, Gus, has addressed one part of the proposed legislation. I would like to address another. I would like to pick up on what Mr. Raimondi said. He told you about the problem he has in placing a notice of copyright on or behind his work, or what have you. The fact is that many artists have their works—most artists have their works thrust into the public domain solely because our copyright laws uniquely require that a notice of copyright be affixed to the work in order to claim copyright—something our artists just don't do, Raimondi said.

It is to be emphasized that artists from no other country are required to comply with such a formality. The question we have to ask ourselves about the legislation, as it applies to notice of copyright, is who is going to be hurt by it. I suggest that no one will be. The affect upon the user of the proposed amendment of the law that gives visual artists protection under the copyright laws even though his work does not carry a notice of coopyright is nil.

Again, we take as our premise, that American artists do not place a notice of copyright on their works, or on the reverse side of their works, and that their works can currently be reproduced without their permission. If the amendment were enacted, two questions must be asked: Will fewer works of art be reproduced because artists will now have the right of copyright in their works absent a notice of copyright; and two, will fewer works of art be reproduced because the fee is charged for such reproductions will make reproduction prohibitive.

Although it is tangential, I must respond to something Ms. Krauss said. V.A.G.A. charges no more than $5 per reproduction to any member of the College Art Association, and if that sum is too high then the fees are waived.

To go on, with regard to the first question, and that is will fewer works of art be reproduced—I doubt that less art will be reproduced because the artist or his estate says no to such reproduction. The one thing that Ms. Krauss omits from saying is that the artist, as other creative artists, if they have a copyright have a right to say, no, they don't want to have their work reproduced.

With regard to scholarly publications, art magazines, reviews and the like, the answer rarely, if ever, will be no. And it is unlikely that use of fine art reproductions will be diminished. One has to know how pleased an artist is to find his work reproduced in an art magazine, a coffee table art club, or indeed in a Ph.D. thesis. On the other hand, for example, an artist may not wish to have his work reproduced as backdrop for promotion of an automobile, or display at a movie that depicts S&M or violence. Such a potential user should either obtain permission from the artist, or choose a work of art that is available to him.

These users pay for music play, for dialog spoken, and for models photographed. Why is the user damaged if it pays for the work of art displayed—I submit that it is not hurt. If the artist wishes the reproduction, he will cite a fee to the potential user or waive it. The user will either meet that fee, or find another work to reproduce or display.

Visual artists are the only artistic creators who currently do not have the option to say no. The only way they can stop the publisher from reproducing their works without their permission—and again we are assuming that they don't place a notice of copyright on the work—is if the publisher wishes to sell, distribute, or produce the work outside of the United States where the notice of copyright is not a requirement for protection.

I submit that users will not be inhibited because artists will gain the same rights as other creators. Once and for all, rights will be clarified and users may in fact be encouraged to reproduce works of art, even though such works are protected by the copyright laws. The second question, and that is will the fees be too high, is in reality an extension of the first.

Will artists charge so much for the right to reproduce their works that scholarly publications, for example, that are marginally financed, will be unable to use the works. It is repectfully submitted that this is the straw man.

V.A.G.A. has dealt with art publishers across the spectrum for almost 10 years, from the Ph.D. candidate in art history writing on 20th century American art, to the largest art publishers. In those cases when the artists' rights have been recognized by the user, V.A.G.A. has never had a problem establishing a fee structure that is to be lived with by the user. Less than 1 percent of inquiries ended in refusal to reproduce because the fees were too high. Artists almost universally wish to have their works reproduced in these media, and there is no problem in custom making fees to meet the economic realities.

There are a number of changes I suggest to the proposed legislation, and I have submitted a memorandum in regard to those changes. I would like to mention only one, however, now. There is no reason why the effect of the proposal to delete the requirement of copyright notice cannot be retroactive. By this, I suggest that works of art created before the enactment of the new legislation should be protected under the new copyright legislation—with two exceptions: One, those works that were reproduced before the new law was enacted and are still being reproduced and offered for sale; two, those reproductions that are made by or on behalf of the owner of the original work if the work was purchased prior to January 1, 1978.

This retroactivity would finally bring us into harmony with the rest of the world. And we cite it to the artists and to our society. In closing, Senator, I heartily endorse your efforts and endorse the proposed legislation, and urge its enactment.

Thank you.

[The prepared statement of Mr. Bressler follows:]

PREPARED STATEMENT OF MARTIN BRESSLER

My name is Martin Bressler. I am an attorney in New York City. The majority of my practice is in the area of visual arts. I am founder and Vice-President of Visual Artists and Galleries Association, Inc. (V.A.G.A.), an organization deeply involved in protecting the integrity of artists' works. V.A.G.A. is a membership organization consisting of 500 fine artists and galleries in the United States. It is the exclusive U.S. representative for like organizations in many European countries.

I speak in favor of the S.2796 which has been introduced by Senator Kennedy in the 99th Congress. I assume that similar legislation will be introduced in the new Congress.

The proposed law is codification of an idea whose time has come.

It recognizes that visual artists are creating our patrimony and, consistent with the constitutional mandate to secure for a limited time to "authors...the exclusive right to their respective writings...", puts into law a number of practical steps which will enhance such creative effort.

Specifically, what does the Bill say:

1. It provides that an artist or if dead, his estate, can, for a period of 50 years after his death, insist that he receive credit as the creator of a publicly

displayed work or, conversely, to disclaim such authorship, if such work has been distorted, mutilated, or altered.

This right of attribution, long recognized in Europe, and more recently accepted by our courts as part of the trade-mark law, is significant. It takes cognizance that an artist's reputation is at stake whenever a work created by him is publicly displayed. If an artist's creation is publicly displayed, then of course he should receive credit as its creator. If he intended that his name be affixed to his work, for example, no one but he should have the right to remove it. On the other hand, if his publicly displayed work has been distorted, mutilated, or altered, the artist should have the right to say to the owner "Do not hold that work out as being created by me. I don't want to be associated with it any longer".

2. It provides that the intentional or grossly negligent distortion, mutilation or alteration of a work of art constitutes an infringement of copyright enforceable exclusively by the artist during his lifetime and by his Estate for a period of fifty years after his death, whether or not he is the copyright proprietor.

This amendment to our copyright laws is also significant. Its philosophical predicate is that an artist does indeed retain an interest in the work created by him even if the work is no longer owned by him.

That interest is to assure that his work remains substantially what it was intended to be. This is important to society as a whole as well as to the artist because once an artist's work is distorted or mutilated it is lost from our patrimony, and from the artist's body of work. It is different than an aria played occasionally in rag-time; in such event the intent and creation of the composer is not lost--it is only bent a little.

The proposed amendment says that the artist indeed retains a right in his work: the right to preserve the integrity of his work. Another way to say it, is that the new law recognizes that the artist's personality is part of every work he creates and if that personality is interfered with, the artist can claim an infringement of copyright. It is, in a sense, the engrafting of the laws of defamation into the copyright laws. It is valid to do so and is needed.

3. It provides an exception to cover the removal of a work of art when a building , for example is being torn down, and there is a high risk of mutilation or alteration. A sculpture could be too big for the doorway; a fresco could be part of the wall and so on. This exception obviously has merit.

4. The amendment provides further that the artist and for a period of fifty years after his death, the National Endowment for the Arts, will receive an amount equal to seven percent of the profits from the resale of the artist's work if the selling price is at least 140 percent of the purchase price. Here too, the amendment recognizes the artist's continuing interest in the work of art created by him; in this case, a simple economic interest.

This resale royalty as it is called in California, and the Droit De Suite as it is called in Europe is salutary; it works. Statistics in France, for example, bear out that over the years the droit de suite has not been "welfare for the rich". Rather, it is a recognition that the resale of a work of art is like a replay of a song, the author is entitled to compensation each time it is replayed. One infrequently spoken benefit of this amendment is the psychological boost to an artist inherent in his participation in resale profits. One hears all to frequently of an artist who sells his work for a pittance and then sees its value enhanced over the years, with profit going to others, as his old work competes in the market place with new works created by him. It is to be noted that there is no payment if the seller suffers a loss on resale. V.A.G.A., which has been collection artist's royalties for 8 years, is prepared to assist in establishing procedures for collection of this resale royalty.

While I support this provision, I see no reason why the artist's estate should not share in the resale royalty after his death. Values frequently increase the artist dies and royalties on resalc could be important element in the inheritance left by the artist to his family.

5. Finally and in my view, perhaps the most important part of the proposed legislation is the provision whereby "pictorial, graphic or sculptural works" would not have to carry a notice of copyright in order to be protected under the copyright laws.

Examples abound, where living artists have seen their works thrust into the public domain simply because the artist has failed to place a copyright notice on the work. The United States is unique in requiring the affixation of such a notice as a predicate for protection. Even though the 1978 Copyright Law ameliorates this problem to an extent, it is not enough.

Although the Copyright notice need not be displayed prominently on the work - it can be on the reverse of a canvas for example, very few visual artists employ it,I do not know why, but they refuse to do it. Other nations have not found it necessary to require such notice and there is no reason why we should do so. If the right to reproduce - or to refuse the reproduction - of a work of art is one of the rights given to the creator of the work, upon its creation there is no reason why the formalities of copyright notice on the work be retained.

The problems of locating the creator will not be substantially more difficult than at present nor will arrangement for payment of royalties be insurmountable. Millions of dollars, which I believe users would willingly pay, are lost to artists and their estates because of the notice requirement and artists failure to abide by it.

Although the Bill is not clear on this point, I believe it is intended that this section be prospective only. I propose that it have retroactive effect as well. While I recognize the statutory and constitutional problems that arise, there is no reason why a carefully drafted provision cannot be added that will include all works of art that would otherwise be subject to copyright protection but for the artist's failure to place a notice of copyright on the work. Excluded from liability under this provision would be those publishers who, prior to enactment of the amendment - with an appropriate grace period thereafter - have relied upon the fact that a work was in the public domain when they commenced the reproduction of a work.

Thus an artist who failed to place a copyright notice on a work twenty years ago could benefit from the reproduction of his work if the reproducer had not commenced the reproduction process until the end of the grace period.

There are a number of technical changes I would suggest prior to re-introduction of the Bill. I will not burden the reader with them. Other than the suggestions mentioned above there is one additional change that I urge.

There is no reason why the Bill should be limited to a "work of recognized fine art stature". The engrafting of this requirement onto the Copyright laws is not only unnecessary but can be construed as "elitist" as well. The Copyright laws have never been interpreted so as to make the quality of the work a requirement for protectability. Who are we, or art experts, or art historians to say what is "fine art"? One need only recall the reaction of art historians and critics to impressionist art in the 19th Century or the tomatoes thrown at the orchestra playiny Stravinsky's Rites of Spring publicly for the first time to refrain from incorporating expert opinion in legislation.

Copyright, as it now stands, is available for "original work of authorship". Once that is established a work is subject to Copyright protection. That is all. No other requirement is necessary or appropriate.

The provision was no doubt added to avoid court congestion, and to preserve art that one considers good enouth to add to our heritage.

Our Courts are not overflowing with Copyright infringement cases however and there is no reason to believe that they would be more congested if the requirement of "recognized quality" were deleted from the Bill. Secondly the Bill is not intended as a "preservation" law which is designed to protect historic sites, or in this case, important works of art. That's another law for another time. This is a proposed law which gives an additional private right - to the Creator - and in doing so helps fulfill the Constitutional mandate of promoting "the process of...useful arts by securing for limited times to authors...the exclusive right to their respective writings...

"Nay-Sayers" and "What-Ifs" cannot truly say very much against the proposed law. Surely the Bill can benefit by thoughtful changes and dialogue.

The proposed Bill's wisdom in part lay in its simplicity. The concepts codified in the Bill have worked in Europe and are nothing new. It is a good Bill and hopefully will become our law in the near future.

Senator KENNEDY. Thank you.
Professor Goetzl.

STATEMENT OF PROFESSOR GOETZL

Mr. GOETZL. Thank you, Senator. It is an honor to be here. I am Professor Goetzl from Golden Gate University in San Francisco. It was my privilege to work with State Senator Alan Sieroty in California on the California Resale Royalty Law, as well as the California Art Preservation Law, the moral rights legislation. I have also been authorized to speak on behalf of the Bay Area Lawyers for the Arts, a volunteer lawyers for the arts organization in California, and the California Confederation of the Arts, which is a consortion of many arts organizations.

I am satisfied that this bill, which you have introduced, Senator Kennedy, would do more to advance the rights of artists than any bill introduced in history. Other laws have provided benefits for artists—The National Endowment for the Arts for example.

Senator KENNEDY. Excuse me, one moment, please.

[Off the record discussion.]

Senator KENNEDY. Please continue.

Mr. GOETZL. I was just saying that I don't think any bill in history has so directly addressed the rights of artists as has this bill. It is not coincidental, I should hope, that I am here from California because we already have had experience under two of these measures in California. Others, both on this panel and on the previous panels, have spoken eloquently to the need for the moral rights legislation and for eliminating the need for copyright notice. I am going to take it upon myself to speak to the need for a resale royalty for visual artists.

Copyright law is designed both to encourage the creation of intellectual property as well as to reward its creation, thereby encouraging ever more creation. That visual artists have fared considerably more poorly than other "authors" under the Copyright Act grows ever more clear. See Goetzl and Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis,* 9 Columbia-VLA Art and the Law 15 (1984). [Attachment C.] Each of the three parts of this bill would tend significantly to improve this situation.

A variety of rationales have been offered to support the resale royalty (Droit de Suite) concept. Thus, in France the appreciation in value enjoyed by a work of art upon its resale is deemed to be largely a consequence of the continuing artistic efforts by the artist. (For example, had Robert Rauschenberg not continued to develop as an artist and promote his work, his piece "Thaw" would hardly have appreciated from $900 to $85,000, as in fact it did.) In Germany, on the other hand, it is thought that that higher value was always present in the work of art; it simply was not recognized (realizable?) at the time of the earlier sale and therefore a portion of it ought now to belong to the artist.

A third theory to support a resale royalty is explained in the article by Mr. Sutton and me (supra). In the main, in order to encourage and reward the creation of intellectual property, the Copyright Act grants authors the exclusive right to control the various manners in which a work of authorship can be "used," that is, enjoyed. (See 17 U.S.C.A., section 106, granting the owner of copyright the exclusive right to reproduce the work in copies, prepare derivative works, distribute copies, and perform the work publicly.) Note how, for example, virtually any use, that is, public performance, of the work of a composer or playwright becomes a royalty generating event.

Since none of these exclusive rights provides any meaningful application to the primary manner in which works of visual art are used, rough parity with other forms of authorship requires that visual artists be granted an exclusive right to display the art work. And, to be effective, that display right would have to survive a sale of the art work. (Compare 17 U.S.C.A., section 106(5), with 17 U.S.C.A., section 109(b).) The resale of such a work of art provides an appropriate, that is, convenient and unobtrusive, occasion to require the seller to compensate the artist at a rate set by statute for that use (that is, display) of the art work. Observe, that a resale of a work of art signifies that it is moving to a new display audience. To see an example of how the Copyright Act might be amended to compensate an artist directly for the display of works of art using, in part, a resale royalty, see H.R. 4366, introduced March 11, 1986, by Tom Downey of New York. [Attachment D.]

As I speak to artists and collectors around the country, it has become apparent to me that the better understood the resale royalty concept is, the more it is perceived to be both fundamentally fair and long overdue. What remains is to determine the best form for such a right to take.

Perhaps, the most important change I'd like to see made in S. 2796 relates to the payment of resale royalties which accrue after the death of the artist. The bill presently provides (p. 4, lns. 18–21) that such royalties shall be paid to the National Endowment for the Arts. The many people to whom I've spoken in recent months uniformly fail to comprehend why such royalties should not be paid to the estate of the deceased artist. So it is, after all, with all other patent and copyright royalties. And, I certainly agree. Following the death of an artist, royalties due upon a resale of that artist's works of art should be paid to that artist's estate. Artists, like other authors, should be entitled to control the post mortem disposition of the fruits of their labors. I would respectfully urge that the bill be so amended.

With regard to the operation of the resale royalty, I wish to make some observations and raise some questions.

(1) This bill would impose a royalty of 7 percent of the difference between the purchase price and the resale price provided the latter is more than $500 and is more than 140 percent of the purchase price (p. 4, ln. 24—p. 5, ln. 15). In contrast, the California Resale Royalties Act imposes a royalty of 5 percent of the gross resale price if the latter is more than $1,000 and more than the purchase price (Civil Code, sections 986 (a), (b)(2), and (4)). Thus, the minimum royalty that could become due under S. 2796 would be $10 (resale price of $500 less purchase price of $357.14 equals $142.86, 7 percent of which equals $10). Under the California statute, the minimum royalty is $50 (5 percent of $1,000). It might make the

resale royalty more acceptable if the administrative burden were reduced by specifying a minimum royalty (for example, $50).

(2) Under the bill, failure of a seller to pay the royalty due would "constitute an infringement of the copyright" (p. 5, lns. 6–8). Might an artist then be entitled to the infringing seller's profits? (See 17 U.S.C.A., section 504(b).) Or, assuming the artist had previously registered the copyright per 17 U.S.C.A., sections 408 and 412, to statutory damages? (See 17 U.S.C.A., section 504(c).)

(3) Since the bill constitutes the failure to pay a resale royalty a copyright infringement (p. 5, lns. 6–8), it appears that exclusive jurisdiction to enforce that right would lie in the federal courts. See 28 U.S.C.A. 1338(a). I would recommend the bill be amended to grant concurrent jurisdiction to the state courts to hear such resale royalty actions, at least where the dollar amount involved is below a designated ceiling.

(4) The bill requires an artist "seeking royalty payments" to register with the Copyright Office (p. 5, lns. 16–17). What is it that must be registered: The copyright? The work of art? The artist? I suspect the latter. That probably needs to be clarified. And, is such registration a condition precedent to receiving a royalty? That is, when must that registration take place? Before the resale? Or, might it occur after the resale but before the "infringement action" is filed?

(5) With regard to a seller who fails to register such transfer (p. 6, lns. 4–7), what would be the penalty for such failure? Profits? Statutory damages? And, what if that seller has already paid the royalty?

(6) Might it not be preferable to minimize the involvement of the Copyright Office and leave enforcement of the resale royalty to the artists entitled to the royalty? Just as the American Society of Composers, Authors and Publishers (A.S.C.A.P.) and Broadcast Music, Inc. (B.M.I.), came into existence to facilitate the collection of copyright royalties for the public performance of music, so too, perhaps, the Congress could simply create the right to resale royalties and then allow private initiative to resolve any enforcement problems, including creation of any registry. See McInerney, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F.L. Rev. (1984).

In conclusion, allow me to confess that I am aware that some of my observations may sound odd coming from as strong a proponent of a resale royalty as I fashion myself to be. However, the reason I offer those comments is because, as much as I long to see visual artists enjoy a resale royalty, I do want that law to be fair and reasonable as well as easy to administer.

Recognition of the many contributions, made by visual artists to this country by the enactment of the Artists Rights Amendment of 1986, would be a proud accomplishment for the 100th Congress. Accordingly, I urge this subcommittee to give favorable consideration to this bill.

I deeply appreciate this opportunity to address this subcommittee.

[Attachments to Mr. Goetzl's statement follow:]

ATTACHMENT A

Bay
Area
Lawyers for the
Arts

RESOLUTION

At its regular meeting on September 16, 1986, the Board of Directors of Bay Area Lawyers for the Arts, a non-profit legal services organization with more than 800 members in the Northern California area, unanimously passed a resolution supporting S. 2796, which would amend the federal Copyright Act to provide residual rights, including moral rights and resale rights, for visual artists, while removing the requirement of a physical copyright notice for pictorial, graphic or sculptural works of fine art. The Board commended Senator Edward Kennedy for introducing this important bill, which, if passed, will greatly enhance the rights of visual artists in the United States.

The board unanimously affirmed this resolution at its next regular meeting on November 10, 1986, and further resolved to join in the statement of Professor Thomas Goetzl, chairperson of the Board's legislation committee, at the hearing on this legislation before the subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, which will be held in New York City on November 18, 1986.

A Non Profit
Organization Serving
the Arts

Fort Mason Center
Building C, Room 255
San Francisco, CA 94123
[illegible]

ATTACHMENT B

CALIFORNIA
CONFEDERATION
OF THE
arts

A STATEWIDE, NONPROFIT
ARTS SERVICE ORGANIZATION

BOARD OF DIRECTORS
Executive Committee
President
William Moskin
Development Officer for the City of Sacramento
Department of Parks and Community Services
Vice Presidents
Marian Cristick
Arts Consultant
Karen Eisler
Visual Artist and Executive Director
Mendocino Arts Center
Treasurer
Robert Walker
Business Manager
San Francisco Opera
Secretary
Terri Jones
Arts Consultant
Immediate Past President
Yvaline Johnson
Executive Director
Marin Arts Council
Members
Olin Arredo Barnes
Vice President, Wells Fargo Bank
Vice President, Wells Fargo Foundation
William Cleveland
Manager, Arts-in-Corrections
Department of Corrections
David de la Torre
Executive Director
Mexican Museum
Eleanor Dickinson
Artist and National Vice President,
Artists Equity Association
Leilani Lattin Duke
Director, Getty Center for Education in the Arts
J. Paul Getty Trust
Ernest Fleischmann
Executive Director
Los Angeles Philharmonic Association
Mark Gallon
Mark Gallon and Associates
Robert Garfias
Dean, School of Fine Arts
University of California at Irvine
Jeanne C. Halderman
President, County of Santa Barbara
Arts Associations (CalSBAA)
Jorge Huerta
Associate Professor of Drama
University of California at San Diego
Victoria Jee
Chief of Staff, District Office of
Speaker, Willie Lewis Brown, Jr
Cornelia Johnson
Contributions Administrator
Chevron Foundation
Susan Loewenberg
Producing Director
LA Theatre Works
John Mackanen
Development Director
Film Arts Foundation
Dennis Mangers
Vice President, Governmental Affairs
California Cable Television Association
Lorna A. McLeod
Public Information Director
Redwood Empire Public Television
Joan Nordberg
Arts and Arts Education Consultant
Evelyn Freeman Roberts
Co-Founder and Director
Young Saints Scholarship Foundation, Los Angeles
Sandra Rosas
Artist/Educator/Consultant
Mimi Sahn
Managing Director
Berkeley Repertory Theatre
Lois Wagner
Director, University Events and Services
Stanford University
Colburn Wilbur
Executive Director
The David and Lucile Packard Foundation
Yen Lu Wong
Artistic Director
TNR/Moebius
Affiliate Representatives
Michael Alexander
Dance California
Art Dougherty
California Music Educators Association
Ronald L. Kooby, Esq.
California Association of Museums
Executive Director
Susan E. Hoffman

S2796 (Kennedy) ARTISTS RIGHTS TESTIMONY

The California Confederation of the Arts, the statewide advocacy organization for the state of California, authorizes Tom Goetzl, professor at Golden Gate University, to speak on behalf of the Confederation, its members and the arts community of California and joins with the Bay Area Lawyers for the Arts in endorsing, in principle, Senate bill 2796 on artists' rights.

As the advocacy body for artists and arts organizations in a state which is at the forefront regarding artists' rights legislation for its own artists, the Confederation would like to express its thanks and to congratulate Senator Kennedy for his support of the rights of individual artists from across the nation in authoring this bill.

Artists, arts funders, and representatives of arts organizations from throughout California recently met at the state wide "Congress of the Arts" held in Pasadena this October, and endorsed the following recommendation through the Confederation's Public Policy Committee process:

> "ARTISTS RIGHTS LEGISLATION
>
> The committee supports, in principle, legislation that protects artists' rights, and endorses specifically the concept of S2796, an artists' rights bill introduced by Senator Edward M. Kennedy."
>
> ART MATTERS - Nov/Dec. 1986 Issue
> California Confederation of the Arts

Susan Hoffman
Executive Director

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ATTACHMENT C

Copyright and The Visual Artist's Display Right: A New Doctrinal Analysis

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I. INTRODUCTION

Under Article I, section 8, clause 8 of the United States Constitution, Congress is granted the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] Following the traditions of our English copyright heritage, Congress tailored the statutory law of copyright to function in a free enterprise system.[2] By granting an author[3] the exclusive right[4] to control disclosure[5] and certain uses[6] of his or her creations, the author

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[1] U.S. Const. art. I, § 8 cl. 8.

[2] For a discussion of our reliance on English tradition and precedents, see infra text accompanying notes 24-57.

[3] The term "author" will be used throughout this article in its constitutional sense meaning all creators of intellectual property which fall within the subject matter of copyright; the term "artist" will be used to denote visual artists—a sub-category of authors.

[4] While the constitutional mandate speaks in terms of exclusive rights, the rights granted by statute have never been "exclusive" in the usual sense of the word. As a result of the "fair use" doctrine and through compulsory licensing of certain classes of copyrighted works, the author does not have "exclusive" control over even those uses of a work that fall within the ambit of statutory rights.

[5] The right of "first divulgation" is the most important right provided the author under federal law. Justice Brandeis noted that the question of whether or not a creation of the intellect will be disclosed to the public by its author is deeply rooted in the right of privacy "as a part of the more general right of immunity of the person." S. Warren & L. Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193, 205 (1890-91). As such, an author's creation forms an intrinsic part of what Justice Brandeis termed the "inviolate personality." The core of the pivotal right of first divulgation stems from the society's moral obligation to protect what is nothing less than an extension of the author's personality. Thus, while statutory control of the right of first divulgation provides the author with needed leverage in the market place, the right has an even more important role as a cultural moral imperative.

[6] Just as control over any specific use may not be exclusive as a result of "fair use" and compulsory licensing, the constitutional mandate has never been interpreted to include exclusive

is provided with bargaining leverage when he or she deals with the enterprises that bring the work to the public. By enhancing the artist's bargaining power, the law of copyright promotes the author's well-being, and, ultimately, the public welfare.[7] Thus, giving the author control over specific events of economic value that he or she would otherwise lack the ability to control renders those events compensable and, presumably, encourages the creation of new works.

Under this marketplace model, copyright law has failed to provide most visual artists with economic incentives equal to those of artists working in the literary and performing arts.[8] Few visual artists bother to copyright their creations.[9] Instead, they benefit only from the initial sale of a single copy.

Most works of visual art cannot be exploited financially under existing American copyright law as effectively as works capable of performance or multiple reproduction. In order to correct this inequity, the artist's right to control the use of the expression embodied in his or her tangible works must be accepted and the visual artist granted both public and private rights of display.

Recognition of new exclusive rights in the use of the expression embodied in the tangible object is not unknown to American copyright law. The public performance of a work of dramatic literature has been a compensable event for the playwright under United States copyright law since 1856.[10] Similarly, composers have enjoyed the economic benefits of controlling the public performance of music since 1897.[11] These grants of rights in public performance result from congressional recognition of the artist's right to exploit economically

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control over all uses of a creative work. The law of copyright has been defined from its very beginning as a "bundle of rights" that grant the author control over an enumerated list of uses that the law wishes to render compensable; e.g., while the copying of a protected work for economic gain by an owner of a copy has been turned into a compensable event, the public display of that same work has not been made compensable under copyright.

[7] It has been said that copyright's role in benefiting the author is secondary to its role in benefiting the public. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Sony Corp. of Am. v. Universal City Studios, Inc., 78 L. Ed. 574, 104 S. Ct. 774 (1984).

[8] See infra text accompanying notes 41-57.

[9] See generally Sheehan, Why Don't Fine Artists Use Statutory Copyright?, 22 Bull. Copyright Soc'y 242 (1974-75). While the artist may retain all rights under copyright upon sale of the material object, 17 U.S.C. § 202 (1982), the right to reproduce copies is not very valuable without a statutory right of access to the work after it is sold. Millinger, Copyright and the Fine Artist, 48 Geo. Wash. L. Rev. 354, 363 (1980). Additionally, such rights can be rendered valueless through the right of an owner of a copy (even a unique original) to destroy that work at will—destroying rights in copyright as well. See infra text accompanying notes 18-23 for a brief discussion of an author's moral rights in the United States.

[10] Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).

[11] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897).

the aesthetic use of the expression embodied in a work even in the absence of multiple reproduction and vending of copies to the public.[12]

Even though works of dramatic literature were capable of reproduction in multiple copies in the same manner as the novel, the economic gain to be received from the right to control the printing and vending of the work was minimal when compared to the gain derived from controlling public performance.[13] In order to avoid the inequity of limiting the author to an inappropriate measure while others freely exploited public performance, the playwright was granted the right to control the reproduction, vending and aesthetic use of the expression embodied in the copy.

The visual artist today faces problems similar to but more pronounced than those which historically faced the playwright. Yet Congress has failed to respond to the artist's plight by extending him or her an effective right to control the public, aesthetic use of the expression embodied in his or her works: a right of public display. The 1976 Copyright Act granted the visual artist a right of public display for the first time.[14] However, that right is exhausted upon the first sale of the copy.[15] It is an empty right for the visual artist. The artist, like any other property owner, already controlled public display of his work prior to sale as a part of the traditional incidents of property ownership. This incident of property ownership, like the right granted under the 1976 Copyright Act, also ceased upon sale of the copy. If the new grant of a public display right is to provide the visual artist with financial reward, it must create a right of public display which extends beyond the first sale. Such an extension should be structured as a compulsory license thus allowing the owner of the art work to exercise his or her traditional right of control over the copy and at the same time grant the artist a right to exploit his or her art work.

Furthermore, the visual artist should be granted a right of private display under federal copyright law. The right of private display would compensate the artist for the aesthetic use and enjoyment of his art work by the owner's family and acquaintances. While a right of private display would be new to the law of copyright, it is by no means new to the economic exploitation of intellectual property. Private display has played a major economic role where a copyright proprietor has had the bargaining strength in negotiations but lacked a statutory private display right.[16] As suggested for the right of public display, the interests of the private owner of the copy and the visual artist would be best accommodated through the use of a compulsory license.

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[12] See infra text accompanying notes 41-50.

[13] See infra text accompanying notes 52-57.

[14] 17 U.S.C. § 106(5) (1982).

[15] Id. § 109(b).

The fact that private display exists in the marketplace but not under federal copyright is not to say that it lacks statutory precedent either here or abroad. Such a right of private display presently exists (in rudimentary form) in the European and California *droit de suite*—what is known in France as a "follow up right" and in this country as a resale royalty.[17]

In order to establish firmly a comprehensive doctrinal basis for these new rights, it is necessary to trace their historic roots. Such an historical excursion is more than an academic indulgence. In the four centuries of its development copyright law has been structured around two distinct models. Failure to recognize this has resulted in confusion in the academic literature which criticises the *droit de suite* and the doctrinal inconsistencies of the new federal right of public display.

The first model of Anglo-American law will be referred to as the Gutenberg Model. Its primary referent is the printing press (and analogous technologies). The purpose of the Gutenberg Model was to render compensable the printing and vending of aesthetically equivalent copies. The second model, the Follow Up Model, is completely divorced from the economics of the vending of copies, and instead protects the use of the expression embodied in the work. It renders display and performance compensable.

Distinct collateral bodies of law have evolved for each model as a result of the differing requirements, functions, and policy considerations of the two models. When these collateral principles are removed from the context of one model and are applied to the other model, disasterous consequences result. The most unfortunate results in light of the present thesis are:

(1) The application of the exhaustion principle developed under the Gutenberg Model to the new federal right of public display (a right doctrinally consistent with the Follow Up Model) resulting in a right that serves little or no economic function at all for the visual artist; and

(2) Failure to recognize that the compensable event of the *droit de suite* is the private display of a work of visual art (a function of the Follow Up Model) and not the resale of the copy (a function of the Gutenberg Model) resulting in the assertion by opponents

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[16] See infra text accompanying notes 142-44.

[17] See infra note 81.

that the exhaustion principle forecloses such a right under federal law.

The following is a brief summary of *droit moral* and *droit de suite*, followed by an overview of the historical development of the Gutenberg and Follow-Up Models, their functions and collateral bodies of law. Many civil law countries of Europe recognize the artist's *droit moral*. Usually classified as a right of personality, moral rights are entirely distinct from patrimonial or property rights.

> Copyright, for example, which is available to artists in civil law countries as well as in the United States and other common law countries, is a patrimonial or property right which protects the artist's pecuniary interest in the work of art. The moral right, on the contrary, is one of a small group of rights intended to recognize and protect the individual's personality. Rights of personality include the rights to one's identity, to a name, to one's reputation, one's occupation or profession, to the integrity of one's person, and to privacy.[18]

In countries which have embraced the artist's *droit moral*, economic rights under copyright function as an adjunct of the artist's broader moral right to control the use of what is in essence an extension of his or her personality.[19] The artist's economic rights, in those nations which recognize the moral obligation of society to the creator of intellectual property, arise out of his or her right to control the use of the expression embodied in the art work he or she has created. The

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[18] Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1025 (1976).

[19] Id. See also, Brandeis, supra note 5. While United States copyright law has focused on the author's right to control a limited bundle of uses, it has failed directly to address the equally significant area of the author's need to have protection against the misuse of the work. With the exception of minimal protections in limited contexts, see, e.g., Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976), an author's moral right to protect the integrity of a work after its alienation has not been recognized in the United States. Id. at 24; see also Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). Thus, an owner of a copy of a work of visual art may distort, mutilate and even destroy the work at will—*jus utendi et abutendi*. Cf. Cal. Civ. Code § 987 (West Supp. 1983) (California Art Preservation Act makes actionable the defacement, mutilation, alteration, or destruction of a work of fine art).

This American (and English) reluctance to embrace the principle that artists' rights in their creations stem from the fact that those works are an inalienable aspect of the artists' personalities is most likely the result of the singular Lockean focus, under both statute and common-law, on copyright as a form of intellectual property. Although France and Germany have not escaped John Locke's conception of property as a result of labor in their copyright laws, they have tempered its influence to varying degrees with the Kantean perception of artistic creations as part of the artist's personality. F. Case, Copyright Thought In Continental Europe: Its Development, Legal Theories and Philosophy—A Selected and Annotated Bibliography 12 (1967).

Just as the right of first divulgation is rooted in that branch of the right of privacy granting protection from intrusion into the private aspects of one's life, see Brandeis supra note 5, the author's right to protect the integrity of the work after dedication to the public stems from the second branch of the right of privacy—the right not to have one's personality placed in a false artist's moral right takes precedence over property interests of the art object's owner. In countries which observe the artist's moral right, the owner of a work of art may not alter it or in any way demean the work's integrity.[20] Similarly, under the principle of the *droit de suite*, the artist retains an interest in the work even after its sale and receives compensation on resale for the "new use" of the work whether by private parties or the general public.[21]

Courts in America have consistently refused to accept the principle of an artist's moral rights in his or her creations.[22] As a result of the rejection of this basic principle, the United States has experienced a rudderless development of moral rights law. Such development has been shaped only by the prevailing economic realities of the marketplace, the developing technologies of reproduction of multiple copies,[23] and vague perceptions of the public good.

The failure to perceive the distinctiveness of the public and private rights of display has allowed opponents of the *droit de suite* to assert that the exhaustion principle forecloses such a right under federal law.

II. THE HISTORICAL DEVELOPMENT OF THE GUTENBERG AND FOLLOW UP MODELS OF COPYRIGHT LAW

Traditional scholarship has viewed copyright as a balancing of the tension between the author's property interest and the public's right of

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light through the distortion of one's artistic creations. See Prosser, Privacy, 48 Cal. L. Rev. 383, 398-401 (1960).

The French moral rights protect only against the mutilation or alteration of a work and not against its destruction since only an existing work that has been distorted is capable of placing the author's reputation in a false light. LaCasse et Welcome c. Abbe Quenard, 1934 D. Jur. 385, [1934] Gaz. Pal. II165 (Cour d'Appel, Paris). The California Art Preservation Act, Cal. Civ. Code § 987 (West Supp. 1983), prevents destruction as well as distortion of a work of fine art. Section (a) of the Act reveals, however, that the right is based not only on the traditional concept of protecting the artist's reputation (Prosser's second branch of the right of privacy) but also on the declaration that there is "a *public* interest in preserving the integrity of cultural and artistic creations." This *public* interest, independent of the artist's reputation, would justify a cause of action for the destruction of the work. Thus, while mutilation invades the privacy interest of the artist, destruction invades the society's right to have its culture and heritage protected. Under the new Cal. Civ. Code § 989, a cause of action may now be brought by select organizations on behalf of the public in California for the destruction of a work of art.

Representative Barney Frank of Massachusetts has introduced a moral rights bill in the United States House of Representatives. See H.R. 1521, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,216.

[20] See, e.g., Buffet v. Fersing, 1962 Recueil Dalloz [D. Jur.] 570 (Cour d'Appel, Paris).

[21] For a general discussion of the *droit de suite*, see the secondary materials cited infra note 82.

[22] Granz v. Harris, 198 F.2d 585, 588-89 (2d Cir. 1952); Gilliam v. Am. Broadcasting Co., 538 F.2d 14 (2d Cir. 1976); See generally 2 Nimmer on Copyright § 8.21 [A] (1982).

[23] See infra text accompanying notes 24-31.

access. This view is adequate when analyzing "fair use"[24] and the "idea/expression dichotomy,"[25] but proves unsatisfactory when attempting to reconcile an intrinsic sense that the author's property or other interest flows from the act of creation with a legal and political commitment to the free flow of ideas and a professed distaste for monopolies of any sort.

Much of the inability to affect the reconciliation stems from the failure to recognize that the history of copyright has been shaped not by two but by three interests: those of the author, the publisher, and the public.[26] Our perceptions of the equities and dangers of copyright monopoly shift depending upon whose interest is being examained. It is impossible to do justice to the author under copyright when the hidden source of our response might well be shaped by the problems presented by the publisher's interest and the common-law and statutory rules that have evolved to meet those considerations.

A. *The Gutenberg Model: The Publisher's Right to Reproduce and Vend*

1. The Nature of Copyright Under the Gutenberg Model

From its formal inception under the charter of the Stationers' Company in 1557[27] until 1856 in the United States, when Congress granted playwrights a right of public performance,[28] the nature of copyright was exclusively a publisher's right to print and vend.

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[24] For the statutory embodiment of "fair use", see 17 U.S.C. § 107 (1982).

[25] 17 U.S.C. § 102(b) states:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or embodied in such work.

[26] Particular focus has been brought to the nature and the historical consequences of the relationship among these interests by Professor Lyman Patterson in his book, Copyright In Historical Perspective (1968).

[27] "Copyright appears to have been first recognized as a species of private property in England in 1558." Warren & Brandeis, supra note 5, at 195 n.1. For a comprehensive history of the Stationers' Company, see C. Blagden, The Stationers' Company: A History, 1403-1959 (1960); Patterson, supra note 26, at 1-179; A. Pollard, Shakespeare's Fight With the Pirates and the Problems of the Transmission of His Text, 1-25 (2d ed. 1920).

The incorporation of the Stationers' Company, while beginning the formal history, did not mark the first actual use of copyright in England. Richard Pynson was granted the first printing "privilege" by the Crown in 1518. R. Bowker, Copyright: Its History and Its Law, 19 (1912). "[F]rom 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of stated kinds." B. Kaplan, An Unhurried View of Copyright, 3 (1967).

It was originally designed as a mechanism for the stabilization of the English book trade and remained a statutory scheme for regulating unfair competition between competitors in the printing and vending of copies.[29] The basic thrust of copyright through its first three centuries was to guard against misappropriation of the publisher's interest in the "copy"—an interest resulting from the publisher's investment in the purchase of the author's manuscript and its preparation for reproduction on the press.

Even after copyright was first recognized as an author's right in 1710,[30] the *character* of the right remained unchanged. The author, like the publisher, was granted nothing more than the right to print and vend the copy.

The major force in the expansion of protections under the Gutenberg Model was an advancing technology that increased the classes of subject matter appropriately within the ambit of the Model. The evolution of photographic and photomechanical processes in the latter half of the nineteenth century as well as the development of sound and video recording technologies in the twentieth century have made application of the model more difficult.[31] Nevertheless these technological changes have not appreciably altered the basic nature of the Gutenberg Model as a publisher's right aimed at preventing the copyrighted work's misappropriation by a competitor in the manufacture and vending of copies.

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[28] In 1856 Congress granted performance protection to dramatic works in the Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (1856).

[29] See generally, Patterson, supra note 26.

[30] 8 Anne, c. 19 (1710). It was not until the second half of the eighteenth century that the House of Lords established the doctrine "that authors had always possessed a natural right to the fruits of their labor." A. Pollard, supra note 27, at 4; see Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769); Forrester v. Waller, 4 Burr. 2331, 98 Eng. Rep. 216 (1741); Pope v. Curl, 2 Atk. 342, 26 Eng. Rep. 608 (1741). It was to be several centuries before the conception of an author's personal, inchoate rights began to evolve into *les droits moreaux* in the European civil law countries.

[31] The difficulties presented under the Gutenberg Model by technological evolution is best illustrated by examining White-Smith Music Co. v. Apollo Co., 209 U.S. 1 (1908). The Supreme Court held in *White-Smith* that the manufacture of songs on player piano rolls did not constitute copies within the meaning of the copyright laws because the music was not eye readable. Even though Congress quickly rectified the basic inequity presented in *White-Smith* by giving the author the right to control the incident of mechanical recording in the 1909 revision, Rev. Stat. ch. 320, 35 Stat. 1075 (1909), it did not say that a reproduction can be a copy even though not eye readable. As a result, the Court's Gutenbergean definition of a copy remained to plague the courts until the 1976 revision. The problems were most pronounced in the broadcast and recording industries where phonograph records, videotape, and fixed radio broadcasts could not qualify for copyright protection because they were not eye readable and therefore not acceptable for registration. B. Kaplan & R. Brown, Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Work 10-11 (3d ed. 1978). Protec-

2. The Scope of Rights Under the Gutenberg Model

The scope of the right to print and vend under the Gutenberg Model was shaped by the market interest of the publisher. That interest extended no further than the vending of aesthetically equivalent copies of the author's underlying work. Thus the Model offered limited rights and protections. For example, for more than the first three centuries of the Model's history, an alteration of the form of the work either through abridgment or translation into another language was not considered an infringement of copyright[32] because such a use did not jeopardize the publisher's interest in the sale of copies printed unabridged or in the original language. Protection of the publisher from unfair competition did not require granting rights in the content of the work but only in its specific form.[33]

Furthermore, since the function of the right was to protect the vending of the publisher's printed copies from unfair competition by a

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tion was gradually extended to these new uses of the author's expression, e.g., protection was extended to sound recordings in the Sound Recording Amendment of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. Congress effectively overruled *White-Smith* in the 1976 revision by defining copies as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1982).

[32] For a brief discussion of early English cases that refused to extend protection to abridgements and translations. see Comment, Derivative Works and the Protection of Ideas, 14 Geo. L. Rev. 794, 796 (1980); see also Patterson, Private Copyright and Public Communication: Free Speech Endangered, 28 Vand. L. Rev. 1161, 1188 (1975).

[33] "In deciding infringement cases, the arrangement of words on a page was of more importance to courts than the meaning of the words. A change in the form thus produced a different work even though the content was substantially the same." Comment supra note 26, at 796. This basic tenet of the Gutenberg Model is aptly illustrated by the words of Justice Aston in Millar v. Taylor, supra note 24, 4 Burr. at 2348, 98 Eng. Rep. at 226:

> . . . I am of the opinion that the publication of a composition does not give away the property in the words; but the right of copy still remains in the author; and that no more passes to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments; but he buys no right to publish the *identical work*. (emphasis added). See also 4 Burr. at 2310, 98 Eng. Rep. 205 (remarks of Justice Willes). Thus abridgments and translations of a copyrighted work did not constitute infringement, the publisher (and later the author) was protected only from direct piracy.

competitor, the printing (copying) of a work was not originally considered an infringement absent a vending.[34] Private copying for private use was not actionable prior to 1909 unless that copy entered commerce through a vending.[35]

Finally, since the publisher's copyright interest in a particular copy was secured through the protection of its sale, his interest in that specific copy naturally terminated with its vending. After the sale, the purchaser of the copy was free to use the copy as he or she pleased, destroying it at will, selling it, or, (prior to 1909) copying it for his or her private use.[36] Control over the vending of the work past its first sale could not be justified under a law rooted in misappropriation. Such extended control would protect a copyright owner from much more than the danger of unfair competition and would infringe economic freedoms too greatly.

Exhausting the publisher's interest in the vending of a particular copy with its first sale guaranteed that the right would not conflict with the copy purchaser's traditional incidents of property ownership. Had the publisher's interest not terminated, it would have been impossible to reconcile coextensive rights to vend the copy in both the publisher and the owner of the copy. As Professor Nimmer has stated, "[A]t this point the policy favoring a copyright monopoly for authors gives way to the policy opposing restraints of trade and restraints on alienation."[37]

The first sale doctrine (the exhaustion principle), as shaped by the publisher's interest under the Gutenberg Model, was judicially incorporated into federal copyright by the United States Supreme Court in 1908.[38] The Copyright Act of 1909 statutorily integrated the exhaus-

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[34] Patterson, supra note 32, at 1187-88.

[35] Id. The writers do not intend to imply that since 1909 copying without a vending is necessarily actionable. See Sony Corp. of Am. v. Universal City Studios, (U.S.) 78 L. Ed. 574, 104 S. Ct. 774; reh'g denied 80 L. Ed. 2d 148, 104 S. Ct. 1619 (1984).

[36] Id.

[37] 2 Nimmer on Copyright § 8.12[A] (1980).

[38] The lower federal courts had ruled on the right of a copyright proprietor to control the resale of a work that had passed out of his or her possession as early as 1894. See, e.g., Harrison v. Maynard, Marrill & Co., 61 F. 689 (2d Cir. 1894); Henry Bill Publishing Co. v. Smythe, 27 F. 914 (C.A.S.D. Ohio 1886). The issue was not addressed by the Supreme Court until Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 (1908).

In *Bobbs-Merrill*, the copyright proprietors (Bobbs-Merrill) had printed the following legend on the title page of the novel *The Castaway:* "The price of this book at retail is one dollar net. No dealer is licensed to sell at a less [sic] price, and a sale at a less [sic] price will be treated as an infringement of the copyright." Id. at 341. Bobbs-Merrill argued that the copyright proprietor, tion principle as an appropriate restriction on the right to vend.[39] Section 109(a) of the 1976 copyright revision continues this restriction.[40]

B. *The Follow Up Model: Evolution of Rights in Performance and Display*

1. Failure of the Gutenberg Model

From its very inception, the Gutenberg Model ill-served the theatrical and visual arts. The Model's focus on the compensable event as the

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in strict analogy to the rights of a patentee, had the right to control the retail price of the copies that had been sold to a retailer under the author's right to "vend" granted by Section 4952 of the Act of 1873.

Rejecting the Bobbs-Merrill patent analogy due to the inherent difficulty in applying patent precedents to copyright issues, the Court construed the statute as exhausting the author's right to vend a specific copy upon its first sale. Id. at 349-51. The Court did not preclude the copyright proprietor's right to secure such a restriction under contract. Id. at 350.

[39] In the congressional hearings on the 1909 revision of the Copyright Act, the basic issue of *Bobbs-Merrill* was a matter of great concern to librarians and the second hand book sellers. Early legislative proposals did not expressly embody the Supreme Court's *Bobbs-Merrill* limitation. See, e.g., Bills to Amend and Consolidate the Acts Respecting Copyright: Arguments Before the Committee on Patents of the Senate and House of Representatives, Conjointly on the Bills S. 6330 and H.R. 19853, 59th Cong., 2d Sess. 16 (1906). Thus, there was concern that the new legislation would be interpreted as granting the author a total right to control the disposition of copies as they occurred seriatim. The opponents feared that such a grant would give the author the power to prevent extending library lending rights and to prevent second hand sales. See, e.g., id. at 68-69 (statement of H.C. Wellman); id. at 75-77 (statement of William C. Cutter); id. at 85 (memorandum of R.R. Bowker); id. at 90-91 (statement of Robert U. Johnson); id. at 114 (statement of H.N. Low); id. at 148 (statement of Ansley Wilcox); id. at 158-60 (statement of Arthur Steuart); id. at 190-91 (statement of George H. Putnam); id. at 404 (memorandum of the Committee on Copyright and Trademark of the Association of the Bar of the City of New York).

The fears of the librarians and book sellers were allayed by the addition to the Act of 1909 of the clause that "nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075 (1909). The lower federal courts have adhered to the holding of *Bobbs-Merrill* thus firmly establishing the "first sale doctrine." See, e.g., United States v. Atherton, 561 F.2d 747, 750 (9th Cir. 1977); cf. Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980), discussed infra at note 141. It has come to be viewed as an adjunct to the common-law aversion to restraints on alienation. 1 Nimmer on Copyright § 103.3 (1976); see, e.g., C.M. Paula Co. v. Logan, 355 F. Supp. 189, 191 (N.D. Tex. 1973); Blazon v. Delux Game Corp., 268 F. Supp. 416, 434 (1965).

[40] 17 U.S.C. § 109(a) (1982). For a general discussion of the first sale doctrine, see 2 Nimmer on Copyright, § 8.12 (1982); N. Boorstyn, Copyright Law § 4.4 (1981); see also H.R. Rep. No. 1476, 94th Cong., 2d Sess. 79-80, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5693-94 [hereinafter cited as House Report].

The scope of the exhaustion principle embodied in § 27 of the Act of 1909 was not expanded in § 109(a) of the Act of 1976. According to the House Report, "[s]ection 109(a) restates and confirms the principle" as established under § 27 of the Act of 1909, and states that "the outright vending of numerous aesthetically equivalent copies, while particularly suited to the literary arts, (and to a lesser extent the musical arts) proved either useless or of minimal value to those art forms whose economic potential lay in performance, or display or which adapt poorly to multiple reproduction.

The Theatrical Arts

When a sixteenth century English playwright wrote a play, it was generally purchased outright by an acting company and became its exclusive property.[41] Publication of the play in multiple copies for distribution to the public was considered "bad box office" by the companies and therefore an event to be avoided unless the players were in financial distress.[42] Therefore, while the acting companies frequently registered their plays with the Stationers' Company, it was not to enable them to vend copies but rather to prevent others from obtaining and distributing pirated publications that would adversly affect ticket sales.[43]

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sales of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition." House Report at 79. This last phrase should not be read as an expansion of the meaning of § 27 or § 109(a) past the parameters of *Bobbs-Merrill* to which it refers.

[41] H. Gibson, The Shakespeare Claimants 265 (1962). A playwright could expect to be paid approximately six pounds for the manuscript of a new play. M. Marchette, Shakespeare of London 118 (1949).

[42] G. Harrison, Introduction to Shakespeare 205-06 (1939). This is not to imply that the acting companies were totally indifferent to the money to be earned from the sale of a manuscript to a printer. In fact, Alfred Pollard suggests that such a sale might have been one way of recouping the initial cost of the manuscript. A. Pollard, supra note 27, at 36-37. Even though there is surely some validity to Pollard's observation, it must be tempered by the fact that only fourteen plays from the entire Shakespeare canon were published during Shakespeare's lifetime. Harrison, at 193.

[43] In addition to registering a work with the Stationer's Company to prevent piratical publications, the acting companies were also able to appeal to the aid of their patrons. Pollard, supra note 27, at 35. The same political and religious strife that prompted Crown censorship and the chartering of the Stationer's Company resulted in the censoring and control of the acting companies and the playwrights.

> Elizabeth dealt with the nuisance by an Act declaring all players of interludes to be rogues and vagabonds and liable to the unpleasant penalties provided those poor folk, unless formed into companies under the protection of a Privy Councillor, who would be answerable for their good behaviour. . . .
>
> [O]ne company of players was under the protection of the Lord High Admiral, and another of the Lord Chamberlain, and . . . these were two of the most important members of the Privy Council, which . . . exercised supreme authority over printers and printing. . . .

Id.

On August 18, 1856, Congress granted "to the author or proprietor of any dramatic composition, designed or suited for public representation . . . the sole right . . . to act, perform, or represent the same . . . ."[44] This Act was in response to such economic factors as those that had shaped the English theater.[45]

While the playwright maintained the right to "print and publish the said [dramatic] composition" under the Gutenberg Model,[46] the public performance right was the first statutory provision protecting the right to exploit the aesthetic use of the expression embodied in a work absent the manufacture of multiple copies or the transfer of material property.

Though the performance right marked a new direction for copyright, it was influenced by three centuries of experience under the Gutenberg Model. The basic premise that the function of copyright was to protect against unfair competition was expressed in the public performance limitation placed on the right. Private performance of a dramatic work did not fall within the ambit of the new performance right because it was not regarded as a use of the expression that was either in direct competition with authorized public performances or likely to reduce demand for public performance of the work. Nonetheless, there was and remains, no "for profit" limitation in the Act. It was assumed that demand for public performances of dramatic works, unlike musical compositions, would be reduced by any public performance whether or not for profit.[47]

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[44] Act. of Aug. 18, 1856, ch. 169, 11 Stat. 138.

[45] Not much had changed in the manner of exploiting the use of the expressions of a playwright between Shakespeare's time and the revision of the United States Copyright Act in 1909:

> There has been a good deal of discussion regarding subsection 9(d) of Section 1 [Act of 1909]. This Section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work. He does not usually publish his work in the ordinary acceptation of the term, and hence in such cases never receives any royalties on copies sold. . . . If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909). Congressional sensitivity to the nature of dramatic art was again evinced when it did not include dramatic performances within the "for profit" restrictions of the Copyright Act of 1909, ch. 320 § 1(d), 35 Stat. 1075 (1909). "The law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and therefore unauthorized performance, though gratuitous, will cause the author monetary loss, by depriving him of a potential audience." S. Ladas, The International Protection of Literary and Artistic Property (1938), cited in Study Prepared for the Senate Committee of the Judiciary, Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., 1st Sess. (1960), Study 16, at 83.

This particular awareness of the needs of the playwright's art is further illustrated by the care with which the 94th Congress approached the deliniation of limits on the exclusive right of performance in 17 U.S.C. § 110 (1982). While nondramatic and musical works are exempt throughout the section, only face-to-face classroom instruction without the use of actors, id. § 110(1), a single transmission to a blind audience of a work published ten years earlier, id. § 110(9), and communication of a dramatic performance over a receiver of the kind normally used in the home where no direct charge is made for the viewing, id. § 110(5), are exempt where the material used is dramatic.

[46] Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

When a performance right was finally granted to musical compositions in 1897,[48] the right was similarly limited to public performances. A "for profit" limitation was added to the right of public performance of music in the Act of 1909.[49]

Under present copyright law, the characterization of an event as either private or public is qualitative and not quantitative—the number of people experiencing the event is generally irrelevant. A performance before one hundred close acquaintances at a social gathering listening to an orchestra play a copyrighted song would be considered a private performance under Section 101. A similar performance before a single couple in a restaurant would be considered a public performance.[50]

From its beginning, the new follow-up right had one aspect that marked a total departure from the Gutenberg Model. The first sale doctrine was not applicable. The new right to exploit the use of the expression embodied in a specific copy of a work survived the sale of the copy.[51] Thus, the economic value of the aesthetic use of the expression was effectively separated from the economic value of an individual copy in which that expression was embodied.

The Visual Arts

It has long been recognized that most works of visual art are not protected under the Gutenberg Model:

> [C]onventional copyright protection though meaningful to writers, may be irrelevant to painters and other creators in the graphic arts. The prime (though not the only) protection afforded by copyright is the right to control reproductions of a given work. Since economic exploitation of the written word is mainly realized through repro-

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[47] See supra note 45.

[48] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

[49] Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075.

[50] See, e.g., Herbert v. Shanley Co., 242 U.S. 591 (1917).

[51] The exhaustion principle embodied in § 27 of the Act of 1909 applied only to the right to vend the particular copy while all other rights survived the vending.

> duction, the right to control the making of copies constitutes the writer's key to the economic fruits of his creative efforts. Not so with the artist. Reproductions of works of art have not in the past, and probably still do not to any great extent, represent a meaningful source of income for most artists.[52]

The primary reason for this failure of the Gutenberg Model to provide economic incentive is that most works of art are incapable of reproduction in aesthetically equivalent copies.

As a result, the right to distribute copies of a work granted under section 106(3) of the Copyright Act of 1976 rings hollow. The right to distribute the single original is secured through traditional common-law concepts of property. Copyright protection as economic incentive under the Gutenberg Model adds virtually nothing of value to the artist.

Unlike the right of public performance, there was no right of public display prior to the copyright revision of 1976.[53] Any power to exploit economically the display of a work was derived from ownership of the copy.

The Copyright Act of 1976 included control of the incident of public display as one of the enumerated rights.[54] With the exception of granting additional protections to the copyright proprietor against utilizations of multiple images through the use of electronic media,[55] section 109(b) of the 1976 Act terminates the right of public display upon alienation of the copy.[56] The House Report on the 1976 Act states: "The . . . intention is to preserve the traditional privilege of the owner of copy to display it directly, but [sic] to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected."[57]

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[52] 2 Nimmer on Copyright § 8.22[A] (1980).

[53] 17 U.S.C. § 106(5) (1982).

[54] Section 106(5) grants the author the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display that copyrighted work publicly."

Spain is the only nation in the foreign community to have a display royalty as part of its copyright law. Article 9, Ley de la Propiedad Intellectual (Jan. 10, 1879) states: "In the absence of an agreement to the contrary, alienation of the work of art shall not imply alienation of the right of reproduction, nor the right of public exhibition of the said work."

Of course, it cannot escape notice that the new English Public Lending Right Act, 1979, c. 10, would be classified as a private display right under United States copyright law. The English act "provides for a right to be conferred on authors, by virtue of which payments will be made in respect of loans of their books from public libraries." Id. (Preliminary Note). 17 U.S.C. § 101 states: "To 'display' a work means to show a copy of it . . ."; therefore, the reading experience is a "display" of the material read, and the taxing of a surcharge on the library experience is nothing less than a compulsory license based on a limited right of private display.

Such a library lending right is analogous to a right of private display for visual artists measured by a resale royalty. In other words, the experiential event, the reading of the book, is the compensable event for the writer, and that event is measured by the act of lending. The experiential event of private display of a work of visual art is similarly measured by a more public event, the resale of the copy.

Similar lending acts have been passed in Denmark (Law of March, 1946), Sweden (Royal Decree of 17 June, 1955, modified to June 1961), Norway (Law of 10 December, 1947), and West Germany (Copyright Statute, Law of 9 September, 1965).

A close examination of the section 109(b) exemption and the above quoted text from the House Report reveals a deep doctrinal inconsistency. While the right of public display is an analogue of the right of public performance in that both rights render compensable the aesthetic use of the expression embodied in the copy, the public display right is not granted for the purpose of advancing the inherent right of the artist to benefit economically from aesthetic use. Rather its express design appears to be to protect the copyright proprietor where the market for multiple copies has been placed in jeopardy through expansive display by a legitimate owner of a copy. For example, textbook publishers feared electronic display of text which would destroy the market for their books. Thus, the new right is inappropriately structured around the requirements of the Gutenberg Model. For example, the right terminates upon sale of the copy and thus closely parallels the first sale doctrine. Furthermore, the right merely augments the Gutenberg Model and does not institute any radical change.

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[55] 17 U.S.C. § 109(b) states:

> Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

[56] Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his or her copy on public display without the consent of the copyright owner. As in the cases arising under § 109(a), this does not mean that contractual restrictions on display between a buyer and a seller would be unenforceable as a matter of contract law.

> The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or a display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the views [sic] are "present at the place where the copy is located."

House Report supra note 40, at 79-80.

[57] Id. at 80.

The inevitable consequence of this doctrinal confusion is that precisely those works of visual art which cannot be exploited as multiple originals in the first instance cannot benefit from the new right of public display based on the Gutenberg Model. Thus, even with the new right of public display, copyright continues to fail as economic incentive to the visual artist working in unique originals. If the congressional purpose was to extend the copyright proprietor's right to control display beyond the sale of the copy where such display adversely affects exploitation under the Gutenberg Model, then it is paradoxical that such an extension should not be considered even more appropriate where the Gutenberg Model does not function in the first instance.

As the next sections of this commentary will demonstrate, both equity and justice require that the new right of public display be structured in a manner consistent with its kindred right of public performance. Such a structuring will require modification of the inappropriate exhaustion principle embodied in section 109(b) of the Copyright Act of 1976 thus allowing the new follow up right to survive the first sale of the copy.

III. EXPANSION OF THE DISPLAY RIGHT UNDER FEDERAL LAW

The congressional grant of control over display extends only to public uses.[58] The statute defines a public display as one that occurs in "a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ."[59] Conversely, where the display takes place within a family context or at a place closed to the public, it is deemed private and hence not compensable under existing federal law.

Such a distinction between public and private aesthetic use of the expression embodied in a copy cannot be supported doctrinally. While appropriate measures of private use may be required by practical considerations to be substantially different from those developed to measure public use, the nature of the right of private display remains qualitatively unchanged from the right of public display. Thus, the answer to whether the public display right should be extended beyond the sale of the copy and whether there should be a federal right of private display depend on two interrelated questions: (1) Can such extensions be justified as a matter of public policy; and (2) Can meaningful measures of the compensable event be developed that will accomodate the artist's interest and other societal values.

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[58] 17 U.S.C. § 106(5) (1982).

[59] Id. § 101.

A. *Public Display*

One need only know the number of attendees at the recent Pablo Picasso exhibit in New York City at the Museum of Modern Art[60] or the Edward Hopper retrospective which toured the United States to grasp the economic significance of the artist's right to participate in public display. Without this right, the education and aesthetic indulgence of the public is being subsidized by the artist or the artist's estate. Monroe Price, in his seminal article on the *droit de suite*, observed: "In actual fact, a substantial part of the costs of the exhibition may be borne by the artist, not the dealer or museum."[61]

At a gallery exhibition the artist often pays for publicity, framing, hanging and opening night festivities. He may be charged a percentage of the rent. At museum exhibits, in particular feature exhibitions, the artist absorbs the cost of creating the work precisely for the exhibition. Proceeds from catalogue sales and special entrance fees go to the museum only.

Not only is the artist being denied a public display compensation fee in the context of art galleries and museums, but recently amassed corporate collections, many of which number thousands of pieces and amount to millions of dollars,[62] are events calling for compensation of the artist.[63] Through their art collections, the corporations combine asset management with improved working conditions and enhanced public image.[64] These works are often on display in public and communal areas and not just in the executive suite.[65] Nonetheless, where these works are displayed is unimportant because analysis of the federal definition of copyright reveals that the corporate use is public. The displays are either in areas open to the public or are beyond the "normal circle of the family."[66]

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[60] It is estimated that between 1.2 and 1.5 million people saw the Picasso exhibit at the Museum of Modern Art, New York, N.Y., "[a] crowd 25 times the size of Napoleon's Army." Kramer, Now That The Show is Over, New York Times, Oct. 12, 1980 § 2 (Arts & Leisure) at 41, col. 1.

[61] Price, Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*, 77 Yale L.J. 1333, 1353 (1968). In answer to the claim that such exhibits increase the value of the painter's later works, Price states:

> Lawyers, architects, aerospace companies, all furnish some "free" services for promotional purposes. But the artists and sculptors, the institutionalization of the process of uncompensated exhibition has deprived them of the choice as to whether a show of his works should be income producing or not—and if so, the way in which he should modify his demand for payment.

Id. at 1355 n.57.

[62] BankAmerica "began seriously to amass" its corporate collection in 1979; a collection that grew to a magnitude of 3,200 pieces in a period of three years. "BankAmerica found that collecting art seriously would combine asset management with an improvement of the working

The trend in corporate acquisitions is to be encouraged; however, such encouragement need not be at the expense of a public display right for the artist.

Extending the right of public display past the vending of the copy would make the right doctrinally consistent with the follow up right of public performance. Nonetheless, such an extension must be carefully balanced against the owner of a copy's traditional incidents of ownership and the public interest in access to the work.

Balancing Interests: Incorporeal, Tangible and Public

The tangible interests of the owner of a copy have traditionally been subject to the author's incorporeal copyright interest.[67] The ex-

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environment and at the same time would enhance the organization's public image." The BankAmerica collection is dwarfed by the massive 7,000 works in the pioneering collection of the Chase Manhattan Bank. The value of the Chase Manhattan collection has nearly doubled to $7.5 million. Brooks, Confessions of the Corporate Art Hunters, ARTnews, Summer 1982, at 108-09.

[63] See Price supra note 61, at 1342; Brooks, supra note 62, at 108.

[64] See Brooks, supra note 62, at 109.

[65] Id. at 110. The 6,000 art objects in the Security Pacific Collection are on display in public and communal areas.

[66] 17 U.S.C. § 101 (1982).

[67] Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object. . . . 17 U.S.C. § 202 (1982). It should be noted that prior to the 1976 revision of the Copyright Act, the courts presumed that the sale of the original work included all of the author's copyright interests in the absence of an express reservation (or at least proof of a clear intention to reserve) those rights. See Yardley v. Houghton Mifflin Co., 108 F.2d 28 (2d Cir. 1939), cert. denied, 309 U.S. 686 (1940); Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1949); Parton v. Prang, 18 F. Cas. 1273 (C.C. Mass. 1872) (No. 10,784); Pushman v. N.Y. Graphic Soc'y, Inc., 287 N.Y. 302, 39 N.E. 249 (1942).

This judicial position, in the framework of the Gutenberg Model, illustrates the strength of the exhaustion principle and its relation to copyright as a printer's right—a financial interest in the tent of an author's copyright can be either exclusive or subject to compulsory licensing.[68]

The follow up right of public performance is exclusively under the control of the copyright proprietor.[69] For example, the owner of a copy of Arthur Miller's *Death of a Salesman* must seek a performance license before he or she can present a theatrical production of the play. Similarly, the owner of a copy of sheet music or a sound recording must obtain the permission of the copyright proprietor in the underlying music before it can be performed publicly. Of course, inherent in exclusivity is the power to deny altogether use of the work under the right.[70]

Under compulsory licensing, the intangible interests of the copyright proprietor are not exclusive because he or she cannot deny anyone access to the work. Along with the fair use doctrine[71] and the idea/expression dichotomy,[72] compulsory licensing is a principal weapon in the congressional arsenal protecting the public interest in access to artistic works.[73] Through the device of compulsory licensing, the public may have access to the work in apparent derogation of the

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particular copy of a work that was exhausted upon sale. See supra text accompanying notes 32-40.

[68] Under the 1976 revision of the Copyright Act, the following compulsory licenses were created or carried over from the 1909 Act: (a) 17 U.S.C. § 115 (1982) (nondramatic musical works), (b) id. § 116 (jukeboxes), (c) id. § 118 (noncommercial broadcasting), (d) id. § 111 (secondary transmissions).

[69] With the exception of totally exempting certain public performances (i.e. non-profit, educational, religious) under 17 U.S.C. § 110 (1982), all public performances are exclusively within the control of the copyright proprietor under § 106(4).

[70] It is this total ability to deny access that provides the author with economic leverage in the market place.

[71] The "fair use" doctrine is embodied in 17 U.S.C. § 107 (1982).

[72] See 17 U.S.C. § 102(b)(1982).

[73] The first compulsory license was the mechanical recording license. Before its enactment, a congressional report stated:

> It was at first thought by the committee that the copyright proprietors of musical compositions should be given the exclusive right to do what they pleased with the rights it was proposed to give them to control and dispose of all rights of mechanical reproduction, but the hearings disclosed that the probable effect of this would be the establishment of a mechanical-musical trust. It became evident that there would be serious danger that if the grant of right was made too broad, the progress of science and useful arts would not be promoted, but rather hindered, and that powerful and dangerous monopolies might be fostered which would be prejudicial to the public interests. This danger lies in the possibility that some one company might secure, by purchase or otherwise, a large number of copyrights of the most popular music, and by controlling these copyrights monopolize the business of manufacturing the [sic] selling music-producing machines, otherwise free to the world.

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909). The company feared was the Aeolian. Study Prepared for the Committee on the Judiciary (Senate), Subcomm. on Patents, Trademarks, and author's right to control access. As slight recompense the user must pay the author for the use.

In structuring an expanded public display right, a balancing of interests between artist and proprietor could be achieved through the use of compulsory licensing fees established by statute.[74] Through the device of compulsory licensing, the owner of the copy would be able to display publicly a copyrighted work at will. In return the owner would be required to pay the artist a statutorily established licensing fee. This fee might, in appropriate instances, be passed on to the public.

The right of public display coupled with use of a compulsory license would not limit public access to the work in any way. In fact, under such a scheme, access could be denied only by the owner's exercise of his property rights and not by the artist's exercise of copyright. Furthermore, just as the artist could not prohibit a public display, neither could he or she require it.

Thus, through elimination of the doctrinally inappropriate first sale doctrine embodied in section 109(a) of the Copyright Act of 1976,[75]

Copyrights, 86th Cong., 1st Sess. (1960), Study 5, at 11 [hereinafter cited as Senate Study]. Thus, once the copyright proprietor of a song made a sound recording, anyone else could make a recording under § 1(e)(a) of the 1909 Act upon payment of a set licensing fee.

It should not escape notice that this first compulsory licensing provision was designed to combat enterprise monopoly (i.e. the aggregation of many copyrights). It has since been criticised as unnecessary in light of the Sherman and Clayton Antitrust Acts. Senate Study, id., Study 6, at 113.

[74] The writers acknowledge that compulsory licenses, while solving some basic issues in accommodating the interests of the author with first amendment values, are not without problems of their own. For example, compulsory licenses tend to distort the free enterprise system by dictating the author's initial bargaining position. See Senate Study, supra note 73, Study 6, at 106-07; see also Note, Moral Rights and the Compulsory License for Phonorecords, 46 Brooklyn L. Rev. 67, 80-81 (1979-80).

Professor Paul Goldstein suggests that an extension of compulsory licenses to all rights under copyright could have dire consequences. Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 U.C.L.A. L. Rev. 1107, 1136 (1977). Where compulsory licenses are allowed for the manufacture of copies (as with the mechanical recording license) product development is influenced resulting in a reduction of "the range of differentiation among work products." Id. at 1135, 1136 n.118. This flattening effect disserves the constitutional purpose to promote the progress of the arts. Id. This influence over product development is greatly reduced where the license is for a follow up right such as the performance of copyrighted works by cable systems; exclusivity of rights still operates in the development of the work's content and the manufacture of copies. Id. The same would be obviously true of a display right.

For a discussion of the constitutionality of compulsory licenses in terms of the author's exclusivity under the constitutional mandate, see Shaffer, Are the Compulsory License Provisions of the Copyright Law Unconstitutional? 2 Com. & L. 1 (1980).

[75] 17 U.S.C. § 109(a) (1982).

the disparity in economic incentives between the visual artist and his or her colleagues in the performing arts would be significantly reduced.[76]

Under an expanded public display right, an equitable measurement of aesthetic use of works of visual art by public entities must be based, like the public performance right, on a measurement of demand and availability. Once the right has been granted, enforcement intermediaries—perhaps along the lines of the performance rights societies such as BMI and ASCAP[77]—could develop proper measures.[78]

The artist should not be required to support the education of the public out of his or her pocket. The means of developing financial mechanisms to accommodate the visual artist's incorporeal interest in public display and the tangible interest of the public institutional owner[79] of copy are uncertain. The granting of an expanded display royalty for works of visual art would require modification of the economic structure of our public museums and galleries. While imposing rights in public display would increase the burden on public institutions already faltering under financial strain, this fact cannot be allowed to silence the basic inquiry: who should pay the piper? If the public museums and galleries are in financial difficulty, the blame surely does not fall on the artists whose works are exploited. Since the birth of the public institutions of aesthetic consumption, the artist has been their primary benefactor. For a solution to the economic problems of these institutions, society should look elsewhere. Achieving financial stability for these public institutions will require a careful balancing of financial responsibility among actual users, government, and private sector sources.[80]

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[76] As was observed supra note 54, the reading experience is also a private display. It would have to be determined whether a right of private display subject to compulsory licensing would be limited to works of visual art or be extended to the literary arts thus creating a library lending right.

[77] ASCAP came into being after the granting of a performance right in music. Sherman, Incorporating of the Droit de Suite into United States Copyright Law, 18 Copyright L. Symp. (ASCAP) 50, 66 (1970).

[78] This article will not propose any specific mechanism or measure for a new right of public display; however, it is necessary to note that the structure of the measures will undoubtedly be complex because of the varied situations in which works of visual art are displayed. The complexity of the problem should not be allowed to negate the justice of the right.

As a possible means of approaching the complex issue of appropriate measures, the writers suggest that a flexible format for establishing licensing fees be utilized. For example, in the present Congress, a bill has been proposed that will place private audio and video recording under compulsory licensing by taxing recording machines and tape. H.R. 1030, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,214 (companion bill S. 31, 98th Cong., 1st Sess. (1983), 2 Copyright L. Rep. (CCH) ¶ 20,206). Under § 119(c)(2)(A), (c)(3)(A) of the proposed bill, appropriate royalty fees are determined in two ways, through voluntary negotiation between a group of negotiators representing copyright proprietors and video tape and machine manufacturers, and through compulsory arbitration binding all those that did not elect to participate in the voluntary negotiations.

Under a flexible negotiating and arbitration scheme, representatives of major displayers (corporations and public museums etc.) could be segregated according to use for negotiations and arbitrations that reflect the particular realities of the various entities.

Although designed for a different purpose, a workable public exhibition fee schedule has been successfully used in Canada since 1968, and in Great Britain since 1979. Under this schedule, the fees are set as a function of the type of exhibition (e.g., regional, national or international; juried or nonjuried; touring or nontouring), the number of artists involved, and the duration of the exhibition. CARFAC, Recommended Minimum Exhibition Fee Schedule. Canadian Artists' Representation Le Front Des Artistes Canadiens, 1980 rev. 1982 (pamphlet). It has been confirmed that this schedule is successful in collecting fees from exhibition. Interview with Pat Durr, National Representative, CARFAC (Feb. 1984).

B. *Private Display*

Because of the inability of the Gutenberg Model to serve as economic incentive to visual artists, various civil law countries of Europe as well as countries in Africa and South America and, most recently, the State of California have enacted some form of *droit de suite*. *Droit de suite* has become known in this country as the visual artist's "resale royalty."[81] Under this right, the visual artists share in the proceeds from the resale of their works.[82]

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[79] Development of financial mechanisms for paying new copyright fees is of greater concern with the public museums and non-commercial galleries than it is with corporate displayers. White it is easier to accept a corporate surcharge where the presence of works of visual art enhance the working environment and thus promote productivity as well as corporate image, the problem is more sensitive where publicly supported institutions, already in financial difficulty, are concerned.

[80] Performers have never been required to provide free support for the public education; the performing artists' contribution of their talents to the culture has been considered sufficient. When additional funds for operation have been needed, performing arts management have turned to private sector contributions, government grants, and increased box office revenues before reducing the performers' salaries or asking them to perform free.

Whether there is a correlation between the nature of economics in the performing and visual arts and the fact that the performing arts escaped nineteenth century structuring as educational institutions is purely a matter of conjecture.

[81] The writers will use the terms *droit de suite* and resale royalty interchangably. "Royalty legislation, in one form or another, is in effect in France, West Germany, Italy, Belgium, Portugal, Czechoslovakia, Yugoslavia, Turkey, Tunesia, Morocco, Algeria, Luxembourge, Chile and Uruguay." Duffy, Royalties for Visual Artists, 11 J. Beverly Hills B. 27, 28 (Jan./Feb. 1977).

[82] See generally, Boyers, Protection for the Artist: The Alternatives, 21 Copyright L. Symp. (ASCAP) 124 (1975); Hauser, The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law, 6 Bull. Copyright Soc'y 94 (Dec. 1958).

Some commentators and at least one litigant[83] have argued that federal law forbids extending such a right under state law to American artists. Both the proponents of these arguments, and their opponents have implicitly assumed that the *droit de suite* must be tested against the Gutenberg Model. This false assumption is the result of historical failure to appreciate another complementary model, the Follow-Up Model. The Follow-up Model (recall from earlier discussion how this model created the right of public performance for playwrights) explains and justifies the *droit de suite*.

The following section of this article will discuss the *droit de suite* as a right of private display under the Follow-Up Model rather than as an extension of the right to vend under the Gutenberg Model.

1. The Equitable Position of a Right of Private Display Under Federal Law

The *droit de suite* assures artists a more complete ability to enjoy the rewards of their creations. It is based on the premise that visual artists should have the same right as other authors to exploit fully the popularity of their creations.[84]

> [T]he *droit de suite* would protect the right of the artist to exploit the most valuable process of the perception of his work—viewing. The *droit de suite* achieves this end by providing that, before another may be enabled to make use of the work for his own pleasure, the artist shall receive a reasonable compensation.[85]

Recognition of the *droit de suite* began in France in 1920 and spread to other countries.[86] The California Resale Royalties Act[87] is

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reprinted in 11 Copyright L. Symp. (ASCAP) (1962); Price, supra note 61 at 1333; Schulder, Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States, 61 Nw. U. L. Rev. 19, (1966-67); Sherman, supra note 77; Soloman & Gill, Federal and State Resale Royalty Legislation: What Hath Art Wrought?, 26 U.C.L.A. L. Rev. 322 (1978); Comment, The Applicability of the Droit de Suite In the United States, 3 B.C. Int'l & Comp. L. Rev. 433 (1979-80) [hereinafter cited as Applicability of Droit de Suite]; Comment, The Droit de Suite Has Arrived: Can it Thrive In California As it Has In Calais?, 11 Creighton L. Rev. 529 (1978) [hereinafter cited as In Calais].

[83] Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980), cert. den. 449 U.S. 983 (1980).

[84] Hauser, supra note 82, at 98.

[85] Sherman, supra note 77, at 83.

[86] See Duffy, supra note 81, at 28 n.3; see also, Applicability of Droit de Suite, supra note 82, at 437 n.13.

[87] Cal. Civ. Code § 986 (West Supp. 1983). For a near complete legislative history of the California Resale Royalties Act, see In Calais, supra note 82, at 529-30 n.4.

the only example of the *droit de suite* in the United States. The precise statutory form given the right varies considerably from country to country. The controlling pattern established two distinct, general approaches that base the right either on a percentage of the full sale price, or a percentage of the appreciated value of the work at the time of resale.[88] The doctrinal bases for the statutory form given the right in Europe also vary considerably.[89]

While these foreign examples as well as the California Resale Royalties Act create the backdrop against which any discussiion of the *droit de suite* must be cast, the history and the problems inherent in each statutory formulation have been discussed thoroughly by numerous commentators and need not be repeated here.[90] Instead, this commentary will focus on those general criticisms that reverberate through most of the essays. While these criticisms take different forms, they can be reduced to variations on four themes—the *droit de suite* is unnecessary, ineffective, unfair, and damaging to the art market.

a. Necessity—The Right Under Contract and Incidents of Multiple Reproduction

A statutory *droit de suite* is claimed to be unnecessary because the artist is able to provide for similar benefits through covenants in the sales contract for the copy. Thus for example, "The Artist's Reserved

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[88] France, Belgium, Morocco, West Germany and Tunisia impose a "uniform tax upon the total sale price" of the work. Boyers, supra note 82, at 132 n.16. Portugal, Italy, Poland and Czechoslovakia base their royalty on the increased value of the work. Id.

The California Resale Royalties Act is a hybrid of the two monistic European systems. The royalty is not applied until there has been an increase in the value of the work. Cal. Civ. Code § 986(b)(4) (West Supp. 1983). However, if there has been an increase of even one cent, the 5% surcharge on the transaction applies to the full resale price.

[89] For example, Germany bases the right on the assumption that works of art have an inherent and unrealized aesthetic value that later becomes recognized with a resulting increase in market value. Since the true value was present from the beginning, the artist should be able to participate in the increased value of the later resales. Another school of thought bases the artist's right to participate on the fact that the appreciated value of the work upon resale is the result of the artist's continuing work. In other words, as the artist matures and continues to produce, the increased value of the later works drives up the value of the earlier ones. Since the appreciated value of the early works is the result of the artist's continuing efforts, he or she should be able to participate in this increased value upon resale. See Schulder, supra note 82, at 30-32.

[90] See generally, Kunstadt, Can Copyright Law Effectively Promote Progress in the Visual Arts?, 23 Bull. Copyright Soc'y 233, (1976); Ashley, A Critical Comment on California's Droit de Suite, Civil Code Section 986, 29 Hastings L. J. 249 (1977-78); and the commentators cited supra note 82.

Rights, Transfer and Sale Agreement," a form contract, drafted by Robert Projansky in 1971 includes a provision for a resale royalty.[91]

In 1968, Professor Monroe Price discussed the potential for achieving a *droit de suite* by contract within the context of the "theology" that artists lack the bargaining power to demand such rights through contract, noting that "[t]he prophecy of powerlessness is self-fulfilling."[92] By 1977, Professor Price's thinking on the subject had become "enriched . . .—. . . economic benefits and royalty rights [had not] come through contracts in the marketplace."[93] One commentator has observed:

> [B]ecause of lack of bargaining leverage, artists have found it quite difficult to utilize the artists' royalty reservation agreement. Is not surprising that when an artist is faced with either foregoing the contract or losing a sale, the artist will usually forego the birds in the bush (along with the principles they represent) for the one in the hand.[94]

Even for the popular artist with the bargaining ability to demand such a contract, enforcement of its covenants is fraught with difficulties.[95] "Covenants run no more gracefully with works of art than with most chattels."[96] Therefore, although the advantages of a *droit de suite* are theoretically achievable through careful use of contract, this private alternative has so rarely been used as to fail utterly to vitiate the need for a statutorily enacted follow up right.

Critics similarly argue that visual artists are adequately protected through control of the incident of multiple reproduction. "To the extent that an artist can create and sell a large number of multiples . . . the need for a residual interest in any particular work is reduced."[97] Inherent in this criticism is the failure to recognize that many forms of art are not capable of reproduction in multiples. In addition, many artists simply do not desire to produce multiple images.

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[91] The Artist's Reserved Rights Transfer and Sale Agreement, reprinted in A Guide to the California Resale Royalties Act 23 (M. Price & H. Sandison ed. 1976). Samples of the Projansky contract also appear in appendices 24 and 27: L. DuBoff, The Deskbook of Art Law, 1131-33, 1138-39 (1977); Projanski & Siegelaub, The Artist's Reserved Rights Transfer and Sale Agreement, in Art Works: Law, Policy, Practice 81 (F. Feldman & S. Weil ed. 1974) [hereinafter cited as Law, Policy, Practice]; Artist's Agreement, 181 Studio Int'l 186 (April 1971).

[92] Price, supra note 61, at 1358.

[93] Clack, Artists' Rights, The Cultural Post, Mar./April 1977, at 11.

[94] Duffy, supra note 81, at 36.

[95] Id. at 34-35.

[96] Law, Policy, Practice, supra note 91, at 97.

[97] Duffy, supra note 81, at 32-33.

The *droit de suite* applies to the private display of the unique original by multiple private owners through the sequential ownership of a single copy. The exploitation of multiple derivatives is irrelevant when considering the right of the creator of the unique original to exploit the direct experience of the work. Just as the right of the novelist to exploit the film rights of his literary works exists independently of the right to control the production and distribution of multiple originals of the manuscript, the right of the visual artist to control the experiencing of the expression provided by the unique original exists independently of the right to control the manufacture and vending of derivatives of it.

b. Effectiveness—Right Vs. Welfare and the Low Incidence of Resale

At the crux of the debate, however, is the view of the *droit de suite* as welfare. The seeds of this perception in the United States were aptly illustrated (if not sown) in Monroe Price's seminal article on the French *droit de suite* where he characterized the "fervor" for the right as a "deep-seated romantic view of art"[98] and of the artist starving in his garret. The result of this "nostalgic recollection of the late nineteenth century"[99] is that the commentators are led to the conclusion that the *droit de suite* fails because, instead of benefiting the starving artist, the right has "benefited only the more successful, and hence wealthier, class of artists."[100]

The argument misses the mark, however. The *droit de suite* cannot be understood as "welfare legislation." On the contrary, it should operate within the copyright scheme in exactly the same manner as the presently recognized rights in the statute do.

The first prerequisite of copyright as economic doctrine is the existence of a market force—experiential demand. Copyright is designed to allow the author to share in the economic exploitation of his or her successful works. The exclusive rights to reproduce, prepare derivative works, and, in fact, the right to vend are only of value to the author whose works are in demand. While the author maintains the right to control the potential measuring incidents of the experiential event, the need for protection lies dormant until the marketplace triggers those incidents. No unsuccessful author realizes economic gain under existing copyright.[101]

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[98] Price, supra note 61, at 1334. "The *droit de suite* is *La Boheme* and *Lust for Life* reduced to statutory form." Id. at 1335.

> In almost every discussion of this subject the story of the sale of Millet's *Angelus* for 1,000,000 francs while his granddaughter sold flowers in the streets is recounted. The drawing of Forain, depicting two children in rags observing the sale of a painting for 100,000 francs and saying: 'Look, one of papa's paintings,' is constantly described.

Sherman, supra note 77, at 56. In the only empirical study on resale of works of art in the United States, the problem of artist selling their works for nearly nothing only to have them resold later at fabulous prices is exaggerated. Camp, Art Resale Rights and the Art Resale Market, 28 Bull. Copyright Soc'y 146, 151 (1980).

[99] Price, supra note 61, at 1335.

[100] Duffy, supra note 81, at 32.

When the critic of the *droit de suite* claims that the right will be ineffective because it benefits the successful artist, inherent in the criticism is the assumption that the constitutional mandate "[t]o promote the progress of science and useful arts" is fulfilled at the level of satisfying needs. Thus, adding to the coffers of the already successful (and possibly wealthy) is deemed to run counter to the mandate. Recently, critics of the proposal to extend a performance right to proprietors of copyright in sound recordings claimed such a grant to be unconstitutional in the absence of proof of need. The House of Representatives Committee on the Judiciary resoundingly rejected such a proposition:

> In the first instance, . . . it is virtually unheard of to suggest that a copyright owner should be restricted to receiving compensation from one or more forms of exploitation of his work, if, in someone's (let alone a user's) judgment, such compensation is considered "adequate." Beyond this, no evidence has been offered which would reasonably lead to the conclusion that, at any time during the history of copyright law in the United States, an affirmative, definitive showing of economic "need" is required to invest Congress with the authority to extend protection to a particular form of exploitation of an already copyrightable work of authorship. Similarly, no support is offered for the proposition that historically, it must be proved that the quantity of copyrightable works will actually increase before Congress is empowered to enact legislation to "promote the progress of science and the useful arts." While these arguments may be admired for their creativity, they do not withstand scrutiny.[102]

The Committee went on to respond to the National Association of Broadcasters' contention that the proposed performance royalty would exceed congressional authority because it would be ineffective by noting the United States Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*:[103]

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[101] However, one should pause to observe that the *droit de suite* furnishes artists who sell works early in their careers cheaply some security that they may derive some economic benefit later from the successive enjoyment of the work.

[102] House of Representatives Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 2d Sess., Serial 83, Performance Rights in Sound Recordings 157 (Comm. Print 1978) [hereinafter cited as Performing Rights in Sound Recordings].

> The Court . . . made no finding that protection would in fact cause the human cannonball to soar to even greater heights, nor that "little Zacchinis" would enter the human cannonball business, nor were any such findings necessary . . . The Court did find . . . that the intention of such laws is, "to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public." *In other words, the rights themselves, by their very existence are designed to provide an environment where there is incentive to create works ultimately enuring to the public benefit.*[104] (emphasis added).

In addition to arguing that the resale royalty is ineffective as welfare legislation, the critics claim it is ineffective because of the low incidence of resale. In response to this Solomon and Gill say "[I]f the [royalty] is viewed as a matter of right, the number of artists who actually receive the benefit should be irrevelant . . . ."[105] The proportion of paperback novels being made into films is absolutely miniscule, yet no one would dare suggest that, because of this, the right to control derivative works under section 106(2) should be dropped as a meaningful incident to measure that particular use of the work.

Furthermore, the assertion that the number of resales is small bears examination. Commentators have estimated that artists in the United States who would benefit by the resale royalty number between fifty living artists who have a "secondary or resale market for their work,"[106] and thirty-four percent of the artists whose works are sold in any given year[107] (a number which could be in excess of several thousand.) No statistics exist on the total art resale market, but inferences as to its magnitude can be drawn. In a 1978 empirical study by Tom R. Camp confined to art auctions at Sotheby Parke Bernet for the four year period between 1973 and 1977, 152 living artists had resales of works that would have qualified for payment under a *droit de suite* applying to works valued at $1,000 or more on resale.[108]

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[103] 433 U.S. 562 (1977).

[104] Performing Rights in Sound Recordings, supra note 102, at 158-59.

[105] Soloman & Gill, supra note 82, at 341.

[106] Id.

[107] Price, supra note 61, at 1349.

[108] Camp, supra note 98, at 151.

Mr. Camp's study had only marginal statistics for nonliving artists who would be covered were the royalty for works reselling for $1,000 or more extended to life plus fifty years. Eleven American artists who died within five years of the four year study period had resales.[109] A reasonable projection could yield a figure of approximately 110 nonliving artists whose families would benefit from the royalty.

Therefore, the royalty for works selling at Sotheby Parke Bernet alone for $1,000 or more by artists under a life plus fifty years statute would benefit approximately 262 artists or their families. When we consider that art sales and resales in the United States, unlike France, do not take place primarily at public auction,[110] the number of resales may in fact be quite significant.

In a 1980 newspaper interview, Sotheby Parke Bernet President, Peter McCoy, estimated that their Los Angeles auction house had paid resale royalties to between fifty and 100 artists, and Melvyn Nefsky, a Los Angeles accountant and business manager for several artists and dealers, said he personally had seen at least fifty resale royalty checks.[111] Calvin Goodman, a Los Angeles management consultant who specializes in the art market, estimated that about $750,000 was due in 1980 artists' royalties "if everybody were playing straight up."[112] This three-quarter of a million dollar projection is only for resales taking place in or by the residents of one single state!

c. Fairness—The Owner of the Copy

Coupled with the myopic view of the *droit de suite* as welfare and the purported low incidence of resale is the belief that the royalty is somehow unfair to the owner of the copy. As a "major theoretical criticism," the royalty is seen to run "counter to our notions of property ownership . . . . Why should works of art be treated differently from other chattel?"[113] One commentator has forcefully answered this question with a twofold response:

> First, art works must be considered to be different from other property because of the contribution they make to our cultural heritage. This is a point that most Europeans, and many Americans, are

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[109] Id.

[110] Ashley, supra note 90, at 255, 258.

[111] Isenberg, The Art Royalties Act: The 5% Evasion, L.A. Times, Dec. 21, 1980 (Magazine) at 6, col. 3.

[112] Id. at 6, col. 2.

[113] Schulder, supra note 82, at 28.

> coming to accept without question. Secondly, the art proceeds right can be justified as a property right that persists after alienation of the physical object. To begin with, the United States Constitution has taken a special view of artistic and scientific works. The Constitution gives Congress the power to give exclusive rights to artists to their work (for a limited period of time) so as to promote the progress of the arts. The divisibility of the copyright is accepted and is expressly set forth in the Copyright Revision: "The ownership of a copy is recognized distinct from ownership of the material object." Artists may sell their work and, yet, retain their copyright.[114]

Because the *droit de suite*, as a right under copyright, would not attach to the material manifestation of the work but rather to the aesthetic use of the expression, the right of the owner to dispose of the copy at will would not be affected by the right. The Court of Appeals for the Ninth Circuit in *Morseburg v. Baylon*[115] rejected the appellant's argument that the owner of the copy had lost a fundamental property right. The court denied "that the [California] Resale Royalties Act affects the very heart of the relationship between buyers and sellers of art; and that there is no public interest whatsoever to support such meddling."[116] The court found the Act to be "neither arbitrary nor capricious" but supported by a rational basis.[117] Viewing the legislation as a reasonable means of adjusting burdens and benefits of economic life, the court held that "[i]n its present form [the Act] does not affect fundamental rights."[118]

1.) *The Art Investor*

However, the unfairness criticism appears to gather particular force when the owner of the copy is an art investor:

> Since the collector's money is at risk, is it equitable that a collector must pay the artist if the work appreciates, yet bear the loss if the work depreciates in value? Isn't it logical, given such a situation, that the artist reimburse the collector if the value of the work decreases? The situation is aggravated if the royalty is payable even if there is no profit on resale . . . .[119]

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[114] Id. at 28-29.

[115] 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1981).

[116] Id. at 979.

[117] Id.

[118] Id.

[119] Duffy, supra note 81, at 32; see also Schulder, supra note 82, at 29-31.

This criticism focuses heavily on the highly speculative[120] and very limited[121] art investment market. It fails to recognize "that most purchasers do not buy predominantly for investment purposes."[122] More importantly, it approaches the investment use of art works in an experiential vacuum. One recent commentator reduced works of art to the level of securities.[123] But painters do not paint fungible securities, they produce unique works with individual aesthetic values.

What these economists preoccupied with numbers fail to consider is what Professor DuBoff has identified as the "psychic dividend."[124] This psychic dividend evolves from the investor's aesthetic use of the work's expression—it is the result of private display. To avoid this psychic dividend, the investor would have to place the work beyond experience. However, risking hyperbole, if all of the "valuable" works of art were so secured, their investment value would vanish. It is precisely the aesthetic use of a work's expression that creates the investment value. Therefore, speculating in works of art in an experiential vacuum would make as much sense as speculating in the securities issued by a corporation that has neither assets nor productive activities.

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[120] DuBoff, supra note 91, at 365-66.

[121] Price, supra note 61, at 1351.

[122] Id.

[123] Bolch, Damon, & Hinshaw, An Economic Analysis of the California Resale Royalty Statute, 10 Conn. L. Rev. 689 (1978).

[124] DuBoff, supra note 91, at 364.

> When the capital value of a stock increases and the dividend remains constant, the percentage return has fallen. In this situation, investment counselors usually advise clients to sell and reinvest in a stock paying a higher dividend. In other words, a wise investor always tries to maintain a constant percentage return vis-a-vis his portfolio value. An art investor could theoretically follow this same practice—albeit on an *aesthetic* rather than an *economic* level. Thus, when a creation is purchased, the collector should receive a certain psychic dividend from the piece. If this periodic return from mere enjoyment declines, the art investor, like his stock purchasing counterpart, should re-examine his portfolio and determine whether to sell and reinvest in a piece which brings an aesthetic dividend more accurately reflecting the creation's cost. Similarly, if a work of art appreciated in economic value, the investor should determine whether the psychic dividend is such as to be worth retaining this investment.

Id.

The existence of a "psychic dividend" can be costly, however, under the Internal Revenue Code. In Wrightsman v. United States, 428 F.2d 1316 (Ct. Cl. 1970), the Court of Claims drew a distinction between an art "investor" and an art "collector" in determining whether the costs of acquiring and maintaining a collection (insurance, travel, cleaning) were deductible under I.R.C. § 212. While the court rejected the Internal Revenue Service's claim that deduction was possible only "by showing a physical segregation of the works of art which precludes personal pleasure," 428 F.2d at 1319, it held the existence of *an* investment purpose was insufficient to claim deductions where "personal pleasure or satisfaction" is primary. Id. at 1322. As Robert Duffy points out, proof that investment and not pleasure is of first importance is a nearly impossible burden for the collector to carry under *Wrightsman*. R. Duffy, Art Law: Representing Artists, Dealers, and Collectors 420 (1977). For an extensive discussion of *Wrightsman*, see DuBoff, supra note 91, at 581-90. See also, Notreb, The Art Collector vs. the Tax Collector, Financial World, May 1, 1982, at 42. Compare George F. Taylor, 6 T.C.M. (CCH) 275 (1947) (deduction allowed where stamp collector derived no pleasure from his collection).

Regardless of the market price on resale, the artist's right to participate economically in the work's aesthetic use should be unaffected. An investor would readily recognize the validity of transaction costs[125] imposed in connection with a sale, regardless of the market conditions at that time. So too, this levy on the aesthetic use is conceptually appropriate irrespective of the market price of the work upon resale. Thus, the artist's right to participate should continue so long as demand propels the work from one owner to the next. The surcharge should be applied even when a successive owner values the viewing experience less than previous ones.[126] When the *droit de suite* is viewed as a surcharge levied upon display by private parties as they occur seriatim, it becomes clear that it is not, in fact, the seller-owner who ought to pay but the buyer-owner.[127]

2.) *The Art Dealer*

Art dealers have been the primary interest group resisting application of the California resale royalty. Levying the royalty against dealers is inappropriate and a disservice to the art market. For example "[d]ealers sometimes agree among themselves to display the works of artists represented by other dealers. These agreements usually provide that the dealer who displays the work of an artist outside his fold will buy some of the paintings from the artist's sponsoring dealer if he cannot sell a certain minimum. Lending agreements of this kind expose the artist's work to a wider audience and increase his chances for success."[128] If there were no such dealer exemption, such transactions, while increasing the artist's chance for success, would be subject to the resale royalty.

In general, the dealer's use of a work is aesthetically neutral and, therefore, comes as close as is possible to an experiential vacuum (pure investment use). Display, by definition, involves aesthetic use of the expression embodied in the work. In the absence of such use no royalty should be exacted.[129]

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[125] Transaction costs would include such items as the dealer's or auctioneer's commission as well as costs of shipping and insurance.

[126] See Schulder, supra note 82, at 30.

[127] Only where the *droit de suite* is viewed as the right to participate in the investment use of the work is the levy made against the seller, i.e., against the person making the profit.

[128] Ashley, supra note 90, at 257.

California State Senator Alan Sieroty, author of the California Resale Royalties Act, recognized the problem in levying the royalty directly upon art dealers and introduced legislation in 1982 to exempt art dealers partially.[130] Thus the 1982 amendment to the California Resale Royalty Act exempts "the resale of a work of fine art by an art dealer to a purchaser within ten years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers."[131]

d. Damage to the Art Market—Problems Inherent In Regional Protection

Critics of the California Resale Royalty Act claim that the right will have an adverse effect on the art market because it tends to: (1) induce participants in art sales to consummate their transactions in jurisdictions without similar legislation, (2) drive collectors from the art market to other forms of investment, and (3) generally diminish the market for contemporary works. Whatever merit these criticisms might otherwise have, federalizing the California law would eliminate them.

In France, where the *droit de suite* operates nationally, fears that the total volume of art sales would be diminished by the right have proved groundless.[132] Nonetheless, some commentators believe, even though the total volume of French art sales has not diminished, France's position in international markets has been reduced as a result of some portion of the market shifting to nations without legislation.[133] There may be some validity to this criticism since the French legislation only reaches French resales. This problem could be avoided in the United States if federal jurisdiction were based on both sales in the United States and United States citizenship of either the artist or the seller. Consummation of the sale in a non-*droit de suite* jurisdiction would be pointless since the American artist would be entitled by United States law to collect the royalty fee regardless of where or to whom the work was sold.

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[129] Under the 1982 revision of the California resale royalty, the ten year limitation on exempting dealer transactions is a legislative finding that any work held for more than ten years by a dealer is presumed to be held for aesthetic purposes and is within the ambit of the royalty.

[130] Cal. Civ. Code § 986(b)(6) (West Supp. 1983).

[131] Id. Dealer transactions were exempt in the only proposed federal legislation. H.R. 11403, 95th Cong., 2d Sess. (1978). It is most likely that if all dealer transactions were exempt, criticism would not be so vocal if it existed at all. Solomon & Gill, supra note 82, at 334 n.80; see also Camp, supra note 98, at 159-60.

[132] Applicability of Droit de Suite, supra note 82, at 440 nn.37-39.

[133] Price, supra note 61, at 1334 n.7; Applicability of Droit de Suite, supra note 82, at 452 n.135 (citing Price), 459 n.182 (citing Note, Artists' Resale Royalties Legislation: Ohio Bill 808

Criticism that the *droit de suite* will adversely affect the art market is unfounded primarily because it assumes that acquisitions, occur in what was discussed earlier as an "experiential vacuum." It assumes that the buyer views comparably positioned works as fungibles without particular "aesthetic dividends" flowing from a specific work. Furthermore it assumes the number of investors who consider works of art fungible is sufficient to have an impact on any market. Since the number of individuals who collect art purely for investment reasons is small in comparison to the total number of participants in the market,[134] this assumption cannot be justified.

The assertion that collectors will switch from works of art to other forms of investment or from contemporary forms to older works not covered by the right must yield to the same reasoning. Such an assertion ignores the psychic dividend which comes to the collector by experiencing work indigenous to his or her own cultural milieu. In other words, it assumes that the art investment takes place in an experiential vacuum. The Camp study revealed that due to the subjective nature of placing economic value on works of art, the five percent royalty under the California legislation is not likely to have an appreciable effect on collector choices.[135] While collectors are "aware of prices and somewhat sensitive to them," Camp's impression was that other factors such as confidence in the dealer were more important to the collector than the sale price.[136]

2. Private Display As a Compensable Event for the Visual Artist Under Law

All statutory rights under copyright are statements of events the law has rendered compensable. While the compensable events are both

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and a proposed Alternative, 9 Toledo L. Rev. 366, 392 (1978) [hereinafter cited as House Bill 808]. See generally Note, A Proposal for National Uniform Art-Proceeds Legislation, 53 Ind. L.J. 129, 132 (1977-78).

[134] See supra text accompanying notes 120-21.

[135] Camp, supra note 98, at 158.

[136] Id. at 159.

doctrinally constant and explicitly stated in the copyright act (e.g., vending copies, displaying, and performing), the measures that have developed to provide practical means of quantifying the author's economic return from those events are not doctrinally constant but vary as technology alters and adds to the means of accessing the compensable event.

Once the copyright had been granted, the development of the collection method for compensation has been left, in large part, to the forces of the marketplace. The market has not been allowed to shape the nature of the compensation in those instances where events are subject to statutory compulsory licensing. The compulsory license removes the copyright proprietor's only bargaining tool, the right to deny access to the compensable event and in return assures him or her a guaranteed statutorily set fee.

The development of compensation schemes has varied greatly with the different subject matter of copyright.[137] Nonetheless all these measures are basically means of estimating price or value from demand and supply, the traditional determinants in a capitalist economy.

Because the compensable event is at the very core of all rights under copyright and the measures are potentially fleeting and of little lasting consequence to its scheme, the measure of the compensable event must be viewed as analytically distinct. A well reasoned development of copyright law requires that the event being measured not be confused with the measure itself.

It is the thesis of this commentary that just such a confusion has developed with the *droit de suite*. While the *droit de suite* is phrased in terms of the resale of the material copy, it is, in actuality, the private display of the work to a new purchaser, his or her family, and social acquaintances that is the compensable event. The resale is merely a convenient measure of that event. As such, it both signals when a new private display has begun and quantifies the value of that new experiential event.

Thus, under the *droit de suite*, the purchase of a work of visual art obtains two interests in the work: (1) absolute possession of the material object, and (2) a license for its private display. At the first sale, the license can be thought of as "implied" since the licensing fee is included in the purchase price. At the time of subsequent transfers, renewal of the display license fee becomes due. Such a formulation of a right of private display is not beyond practical, or at least scholarly, contemplation. Professor Melville Nimmer advanced a similar proposal concerning a private performance license for purchasers of video discs for home use. "If a [private] performing rights license were thought to be necessary, the original purchaser of a video cassette or disc might be thought to be an implied licensee, but this would not necessarily be true of a purchaser upon re-sale from the original buyer."[138] Thus subsequent purchasers would have to pay a license fee to the owner of video cassette's or disc's copyright owner.

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[137] For example, the copyright proprietor of nondramatic music generally does not individually negotiate for performance fees but allows the performance societies (ASCAP & BMI) to establish rates and collect and distribute fees to the appropriate proprietors. Compare that to proprietors of literary property who still individually negotiate with the enterprises which bring literary works to the public.

Unlike the right of public performance or the right of public display, a compensation for private use based on a measurement of actual use necessarily threatens the user's countervailing right of privacy. Resale of the copy represents the least intrusive and the most public incident that may attach to a privately owned copy. As such, it is the most appropriate indicator that a work has moved from one private display context to the next.

Resale may be an imprecise gauge of private display. Transfers by gift or inheritance, while perhaps representing new, and, in the purest sense, doctrinally compensable private displays, would not show up as resales. To the extent such transfers could be feasibly monitored,[139] it would then be appropriate to treat them as "sales" at fair market value and accordingly levy the resale royalty.

When the event which triggers the royalty payment is the resale of the copy instead of its display, the doctrinal justification of the display right and royalty fee becomes confused with the body of law that has shaped the parameters of property interests in the material object. Unfortunately the measure (resale) has been confused with the compensable event (private display). If the compensable event is the resale itself, then the principles of the Gutenberg Model must apply with all of its underlying implications, including the first sale doctrine. This was the position taken by the opponents of the *droit de suite* when they unsuccessfully challenged the constitutionality of the California resale royalty in Morseburg v. Balyon.[140] However, if the compensable event is the private display of the work under the Follow Up Model in which the resale of the copy simply operates as a measure of both the occurrence and value placed on the experiential event, then the first sale doctrine is inapplicable.

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[138] 2 Nimmer on Copyright § 8.14[C] n.47 (1982).

[139] Of course, if the United States were to establish a national art registry, the monitoring of the shift of a work of art from one private user to the next would be possible regardless of the nature of the transfer.

Under the *droit de suite* the right of the owner of the copy to aesthetic use of the art object remains subject to the artist's inchoate interest in private display. When the material copy is transferred by one purchaser to another for private enjoyment and use, a new license for private display arises.[141]

Private display already plays a significant role in the economics of intangible property. Newspaper and magazine advertising rates are not based on the number of copies sold but rather on the number of readers the advertiser expects to reach. This evidences the conceded value of private display. However, in this publishing context, the publisher-copyright proprietor's control over private display is a function of his or her economic power and not a legislatively granted right. The economic interdependence of the parties (the publisher-copyright proprietor and the advertiser) provides the copyright owner the leverage needed to render private display compensable.

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[140] 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980). In *Morseburg*, the Court of Appeals held California's legislation creating a resale royalty constitutional.

The action, brought by Howard E. Morseburg, President of Morseburg Galleries in Los Angeles, was a challenge based on federal preemption of the California legislation under the Copyright Act of 1909. While specifically limiting judgment of the preemption issue to the Act of 1909 thus leaving the question open under § 301 of the 1976 Act, the court held:

> The Copyright Clause does not prevent the enactment by California of the Resale Royalties Act. Nor has the Copyright Act of 1909 explicitly forbidden the enactment of such an act by a state. A bar by implication cannot be found in the word "vend" in section 1 of the 1909 Act.

621 F.2d at 977.

In addition to preemption, Morseburg also sought relief on the bases of (1) impairment of contract under the Contract Clause of the Constitution, and (2) violation of due process arising from the retroactive nature of the statute. Finding not all impairments of contract by operation of state law were improper, the court determined that any present impairment was of insufficient magnitude to trigger the Contracts Clause. Id. at 978-79. The court dismissed the due process argument by finding that the retroactive effects of the California Act were also of insufficient magnitude to merit consideration. Id. at 979-80.

In examining the § 27 prohibition against "restricting" sale under 1909 Act, the *Morseburg* court found that: "[t]echnically speaking such acts in no way restrict the transfer of art works. No lien to secure the royalty is attached to the work itself, nor is the buyer made secondarily liable for the royalty." Id. at 977-78. The court did acknowledge that the royalty might influence the length of time an owner might hold a work as well as having other consequences. Id. at 978. In essence, the court found that *some restrictive influences* on the resale of a copy were permissible under § 27 of the 1909 Act.

It was the opinion of the court in *Morseburg* that the state created resale royalty was an "additional right" that is distinct from the author's right to vend the copy. Id. at 977. The court took no pains to delineate the nature of this "additional right."

[141] On occasion, however, a privately owned work will be transferred to a public institution. Such a transfer should not be subject to a resale royalty but should become subject to the artist's expanded right of public display.

If the visual artist possessed the same negotiating power over private display as the newspaper or magazine publisher, a statutory right of private display would perhaps be unnecessary. Such power, however, simply does not exist.[142] There is no economic interdependence between the visual artist and the purchaser of the copy.

As a matter of power as opposed to right, the artist's only presently existing opportunity to exploit those future private displays is through contractual arrangements with the first purchaser. As was noted earlier,[143] such contractual arrangements have not proven successful both because of the difficulties in their enforcement and because requiring such provisions upon sale assumes bargaining power in the first instance. Therefore, the granting of a statutory right of private display for the visual artist would echo copyright's most basic function—the granting of a right where power fails and doctrine requires it.

3. Private Display As a Compulsory License

Appropriate respect for the constitutionally protected rights of privacy of the owner of the copy requires structuring a rough measure of private use around as public an event as possible. Great care should be given to maximizing the owner's control of private display while at the same time providing the artist with compensation for the work's aesthetic use. As with the proposed extension of the right of public display,[144] this balancing of the interests of the artist and the owner would be best achieved through a system of compulsory licensing.[145]

Under a compulsory private display license, the value of the experiential event could be approximated as a function of the resale price of the copy. Questions of when, how, and even whether a copy would be resold would be answered only by the owner of the copy—the artist's interest extending no further than the right to be paid for use by any new private purchaser.[146]

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[142] Unlike the relationship between the proprietors of literary property and magazine advertisers where economic needs are intertwined, there is no economic interdependence or ongoing economic relationship between the visual artist and the purchaser of a work of art.

[143] See supra text accompanying notes 91-96.

[144] See supra text accompanying notes 60-80.

[145] In this respect, the California resale royalty functions as a compulsory license.

[146] The statutory formulation of an exact method of payment is doctrinally irrelevant. Even though the purchaser upon resale is doctrinally responsible for the fee, the law is not without

Enactment of a federal *droit de suite* would not require modifying any elements in the present statutory scheme. As a right of private as opposed to public display, the *droit de suite* would have no impact on the section 109(a) embodiment of the first sale doctrine.[147] It does, of course, raise basic policy issues as to what is the proper subject matter of the new right. A right of private display that is not limited to works of visual art would extend to literary works since "display" is at the root of the reading experience as well. In the future, cable, satellite, and computer technologies will most likely shift the primary means of accessing the content of literary works from the vending of copies to ephemeral images on a cathode ray tube. In fact it was this very possibility that prompted the inclusion of the new right of public display and section 109(b) exemptions.[148] Regardless of the scope of the subject matter to which a *droit de suite* might be applied, the principles that govern its development must be those that have evolved from the Follow Up and not the Gutenberg Model.

IV. CONCLUSION

Copyright law has failed to provide the visual artist with economic incentives fully equivalent to those of authors working in the literary and performing arts. As a result, few visual artists avail themselves of copyright. To correct this inequity, this Article has proposed that the

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precedent for placing the obligation for collecting the fee upon the seller for later distribution to the artist. Thus, the seller's role is much the same as the merchant who is required to collect sales tax from the buyer.

Although the proposed doctrinal basis would suggest the royalty should be paid by the buyer, it may, in fact, prove more workable to impose the liability for it on the seller. It is the seller whose identity is more readily ascertainable by the artist, and, after all, the seller's sale price should net out the same either way.

[147] 17 U.S.C. § 109(a) (1982).

[148] Id. § 109(b). Section 109(b) was primarily lobbied by the textbook manufacturers who feared that once educational institutions purchased a copy, they would "display" to numerous classes and many students through the use of electronic media thus destroying the market for texts.

> With the growing use of projection equipment, closed and/open circuit television and computers for displaying images of textual and graphic material to 'audiences' or 'readers' this right is certain to assume great importance to copyright owners. A recognition of this potentiality is reflected in the proposal of book publishers and producers of audio-visual works which in effect would equate 'display' with 'reproduction' where the showing is for 'use in lieu of a copy.' The committee is aware that in the future electronic images may take the place of printed copies in some situations and has dealt with the problem by amendments in sections 109 and 110 . . .

House Committee on Judiciary, Copyright Law Revision, House Rep. Report # 4347, 89th Cong., 2d Sess. (1966).

visual artist be granted both public and private display rights in his or her works.

Like their colleagues in the performing arts, visual artists must be granted a meaningful right to exploit economically the public use of the expression embodied in their works of art. Such a right is possible only if Congress recognizes that the present right of public display embodied in section 106(5) of the Copyright Act of 1976 is not based on a recognition of artists' natural right to exploit the aesthetic use of their works under the Follow Up Model but rather in an attempt to preserve traditional rights and ineffective incentives for the visual artist under the Gutenberg Model.

Accompanying the right of the artist to exploit economically aesthetic use of works of visual art by public institutions, federal copyright should incorporate a right of private display. The structure of such a right already exists in the form of the persistently misunderstood *droit de suite* where the compensable event of private display can be valued by the price at which a work of art is resold. The logic, and, indeed propriety of economic control over private display has long been recognized in the marketplace in those instances where economic interdependence of the negotiating parties provides the copyright proprietor with the power to render private display compensable. A private display right for the visual artist simply provides similar economic advantages where similar power is lacking.

In order best to reconcile both the artist's right to exploit economically the aesthetic use of his or her work of art with the owners' traditional property rights, the private and public display rights should be structured as compulsory licenses. The owner of the copy would maintain the right to determine when, where, and whether a copy will be displayed subject only to the copyright proprietor's right to a statutorily determined fee.

The authors recognize the assertion that artists' have an inherent right to control the expression embodied in their works renews the ancient debate as to the source of rights under copyright addressed in Millar v. Taylor,[149] Donaldson v. Becket,[150] and Wheaton v. Peters.[151] While many may consider the substance of that debate long settled, the writers suggest that the time is ripe to heed the words of Justice Oliver Wendell Holmes:

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[149] 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

[150] 4 Burr. 2408, 98 Eng. Rep. 257, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774).

[151] 33 U.S. (8 Pet.) 591 (1834).

> [T]he social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view.[152]

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[152] Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

ATTACHMENT D

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99TH CONGRESS
2D SESSION

H. R. 4366

To amend title 17 of the United States Code to secure the rights of authors of pictorial, graphic, and sculptural works to the display of their works, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1986

Mr. DOWNEY of New York introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 17 of the United States Code to secure the rights of authors of pictorial, graphic, and sculptural works to the display of their works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. EXCLUSIVE RIGHTS TO COPYRIGHTED WORKS.

Section 106 of title 17, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (4), by inserting "and" before "pantomimes" and by striking out "and pictorial, graphic, or sculptural works," in paragraph (5) and by striking out the period

at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(2) by inserting at the end thereof the following new paragraph:

"(6) in the case of pictorial, graphic, or sculptural works, to display the copyrighted work.".

SEC. 2. SCOPE OF EXCLUSIVE RIGHTS.

Section 113 of title 17, United States Code, is amended by inserting at the end thereof the following new subsections:

"(d)(1) Subject to the provisions of paragraphs (2) and (3), the exclusive right to display pictorial, graphic, or sculptural works under section 106(6) shall include both public and private display.

"(2) In the case of a pictorial, graphic, or sculptural work, the owner of a copyright work may display it publicly provided such display is in connection with a bona fide attempt to sell that copyrighted work.

"(3) In the case of a pictorial, graphic, or sculptural work, the owner of a copyrighted work may display it privately provided such owner complies with subsection (e).

"(e)(1) Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay to the author of such work or to the author's agent a royalty. Such royalty shall be equal to 5 percent of the sale price or of the fair market value of any property received in exchange. The right of the author to receive this royalty may be waived only by a contract in writing providing for an amount in excess of this royalty. An author may assign the right to collect this royalty payment provided, however, such assignment shall not have the effect of creating a waiver prohibited by this subsection. If a seller fails to pay an author the royalty, the author may bring an action to recover the royalty within three years after the date of the sale or one year after the discovery of the sale, whichever is longer. The court may award a reasonable attorney's fee to the prevailing party.

"(2) Paragraph (1) shall not apply to any of the following:

"(A) The initial sale of a work where legal title to such work at the time of such initial sale is vested in the author thereof.

"(B) The resale of a work for a gross sales price of less than $1,000, or in exchange for property with a fair market value less than $1,000.

"(C) The resale of a work for a gross sales price less than the purchase price paid by the seller.

"(D) The resale of a work by an art dealer to a purchaser within 10 years of the initial sale of the work by the author to an art dealer, provided all intervening resales are between art dealers. For the purpose of this subsection, an art dealer means a person who is actively and principally engaged in or conducting the business of selling pictorial, graphic, or sculptural works.".

SEC. 3. ENFORCEMENT.

Except for an action brought under section 113(e)(1) of title 17 of the United States Code, no action may be brought to enforce any right under section 106(6) of such title until either ten years after the date of enactment of this Act or until an organization or organizations have come into existence and been certified by any Federal District Court to represent at least 25 percent of all living authors whose pictorial, graphic, or sculptural works are on display in museums with annual operating budgets in excess of $1,000,000, whichever occurs first. Such organization or organizations must be open for membership to any author of pictorial, graphic, or sculptural works which are on display under any circumstance. The term "represent" means, with respect to authors, to have taken from such authors assignments of their rights under section 106(6) of such title for the purpose of negotiating and enforcing those rights. Such organization or organizations shall, after deducting reasonable operating expenses, distribute all license fees collected to the authors represented by them in an equitable manner.

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Senator KENNEDY. Thank you.

Mr. Koegle.

STATEMENT OF JOHN KOEGLE

Mr. KOEGLE. Good morning.

Technically speaking, I should disclose that I have previously served you as counsel to President Carter's National Antitrust Commission, and as such I would like to applaud your recent recapture of the Senate, and express my hope that great things will now happen. I do regret, as a lawyer, that the Judiciary Committee won't have you at the helm, but I trust that you will impart your views to the Senator from Delaware, and we will be well on our way with this proposal.

I am here on behalf of Volunteer Lawyers for the Arts, which is a New York-based nonprofit organization that is made up of over 800 attorneys who donate their time to represent artists who cannot afford legal counsel. As a consequence of collecting a number of specialists in the field of art law, we also go beyond just mere representation, and involve ourselves in issues which relate to the visual or performing arts.

It also just so happens that I have been on the Art Law Committee of the Bar Association of the city of New York for three terms, and the immediate past chairman of the New York State Bar Association Committee on Copyright Law. As a consequence of these involvements, I certainly have been following this legislation and these ideas for as long as I have been involved in the field of art law. For example, when I was in Washington with the Department of Justice, I remember that Representative Waxman had a resale royalty bill, and Representative Drinan had a moral rights bill.

For myself and for Volunteer Lawyers, I am here to support this bill, because, as you said at the outset, I do think the time is now right for this bill. I also believe that you have come up with the most market sensitive proposal that I have seen to date. It is the best bill that I have reviewed and seen in part because you have combined both of the two concepts—and I consider this to be principally a two-concept bill—the moral rights and the resale royalties. Certainly, I am totally supportive of the copyright notice and the paternity point. However, I think that the more controversial and the more significant aspect are the moral rights and the resale royalties. So your combination of these two concepts into one bill, which allows us to speak to the justification of both, is a very, very positive step forward—legislatively speaking.

I also think that you made a number of distinct improvements in this bill over the previous proposals. For example, limiting the resale royalty to just the appreciation portion is a very positive step, I believe. Raising the degree of appreciation to 140 percent is also a very significant, market-sensitive amendment to previous ideas. I also think that removing a lot of unnecessary baggage that has accompanied a lot of these other bills has also helped. And although I think there are still a few suitcases in here that I would like to see dropped, generally speaking as I say, it is far, far better than any other proposal introduced to date.

Your justification for this bill has also become more sensitive and more appealing. As it turns out, I should also disclose that over the years I have actually opposed this legislation. I have opposed it because the ideas of resale royalties and moral rights have been used as a flagship for artists rights. They have been used as a rallying cry, with considerable hype and self-promotion. So that you end up with the arts community being divided. You hear things about artists being discriminated against, about collectors being unjustly enriched—I have never felt comfortable with that. I have always felt that if a law was passed with that justification it would have a way of dividing the artist community—separating collectors from artists.

You have not done that in this bill, or in your justification for this bill. I think it is very important that your advocacy has avoided this and has talked about a partnership between the artists and the collector, between the artist and society as it relates to preservation. So, the notion of partnership, as I say, is the most important approach to this issue. By saying that, all you are suggesting here is that this bill would offer the same economic participation with future success that other authors have by virtue of the copyright laws and that this bill would protect and preserve works of art for future generations through a partnership with collectors. This, I think, is the most important feature.

And just to answer a very difficult question—the one that you put to Larry Rivers about the work appreciating in value as it relates to royalties and the artist benefiting from that increase by the greater is the value of his later work. I think the idea here is to respect the artist. By doing so, you create an incentive to create new work. And this respect also promotes the disclosure or sale of one's work. A lot of artists tend to hold back their work because they are afraid perhaps that this great piece will somehow fall into the wrong hands and be subject to abuse, or they will just lose that piece for the economic value that it may have in the future. A real royalty law would be an incentive to get work out into the marketplace.

So, I want to endorse the bill. But I would like to make one quick recommendation, if I might. It is in our memorandum, or at least in the appendix to it. And that is that while there should be a law establishing this right, it should be very modest and it should be very limited. Therefore, I believe that the marketplace should be the vehicle for enforcement. The registration provisions, which are highly attackable in our community, are something which you should reconsider—and allow the marketplace at least some period of time to see if it can come up with an appropriate enforcement mechanism.

Second, I would also agree with earlier comments that the Arts Endowment is an unnecessary bit of baggage. I would even be willing to support the royalty just to the living artist, if that is necessary. But I think that a tax to the Endowment, as I say, is unnecessary baggage.

So, I am grateful for what I think is a tremendous improvement, and I thank you for your interest.

Let me just add one last point, and that is that our memorandum speaks to the problem relating to the Berne Convention movement

I am sure you have considered this, but I actually differ from the concern that is voiced in the end of our memorandum. I believe your proposals are entirely consistent with adherence to Berne and I would think they would be supported by Senator Mathias in that regard.

[The prepared statement of Mr. Koegle follows:]

PREPARED STATEMENT OF JOHN KOEGLE

The Constitution and the copyright laws have reflected the fundamental public policy that individuals who produce works of art should be encouraged and protected in their efforts. And while artists do have certain residual rights to their creative property, our laws have not specifically recognized for visual artists a continuing financial interest in the future success of that property or a continuing connection to the preservation of and credit for that work. The Visual Artists Rights Amendment of 1986, proposed by Senator Kennedy, addresses these issues. Volunteer Lawyers for the Arts (VLA)* supports the goals of this legislation and approves of this bill.

Toward the continuing economic interest of a visual artist in his/her work, the bill provides that whenever a work is sold for more than $500 and has appreciated more than 40% from the price that the seller previously paid, the artist is entitled to receive a royalty of 7% of the appreciation portion of the sale price. For fifty years following the death of the artist, the royalty would be paid to the National Endowment for the Arts. A vehicle for enforcement would be established through a duel registration procedure with the Copyright Office. Any artist could register his/her name. Thereafter any seller or transferor (of a registered artist's work) would have to file a registration notice of that transaction. The required notice would have to include the sales price. The right of the artist to receive this royalty could not be waived but could be assigned for collection.

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* Volunteer Lawyers for the Arts (VLA), founded in 1969, is a non-profit organization that provides and arranges for free legal representation and counseling to artists and arts organizations with arts related problems who are unable to afford private counsel. The organization is licensed to practice law in the State of New York and has a roster of over 800 attorneys. VLA also provides legal education through publications and communications programs regarding legal problems and the needs of artists. All of its clients create, contribute to, or produce artistic property toward which they have a continuing economic and moral interest.

Toward the continuing moral interest of a visual artist in his/her work, the bill provides that the intentional or grossly negligent, significant or substantial distortion, mutilation, or other alteration of a work is an infringement of copyright and may be asserted by the artist even if he/she is not the copyright proprietor. This right is descendable to the artist's estate for a period of 50 years.

Two modifications to this general moral right, are enunciated in an attempt to treat the particular situation of works of "recognized quality" which are affixed to or incorporated into buildings. Here the law would distinguish between works which can be removed without substantial harm and works which cannot. For works which can be removed, the owner must initially attempt to locate the artist or provide notice and proceed only if the artist fails to remove the work or pay for its removal. If the work cannot be removed, all moral rights are deemed waived unless some formal agreement had been entered into and properly recorded prior to the installation of the work.

In addition to the foregoing major proposals, the bill also provides for a right of the artist (or his estate for 50 years) to claim or disclaim authorship. The right to claim authorship would apply to any publicly displayed work. The right to disclaim authorship would apply to any publicly displayed work which has been distorted, mutilated or altered. This right to claim or disclaim paternity would not apply to works made "pursuant to contract for trade or advertising use".

The bill would establish a new category of "works of fine art" and for these it would eliminate the copyright notice requirement of Section 401 of the Copyright Law.

One final provision of the proposed legislation would exclude the applicability of existing criminal penalties of the Copyright Law to any infringement of these newly created rights.

Statutory recognition of a royalty payable to a visual artist upon the resale of his/her work is by no means new in concept or in legislative attempts. This same statement applies to a grant of moral rights to a visual artist in the ongoing integrity of his/her work. However, this new approach by Senator Kennedy, makes many improvements on earlier proposals. Moreover, in addition to joining these two residual interests into one bill, it has the significant advantage of being national in scope. And while the bill may have areas where adjustments could avoid unintented difficulties in its application, such points do not make this proposal fatally infirm. Since VLA supports the concept of _droit de suite_ and _droit moral_, it accordingly supports this legislative initiative.

The idea of resale royalties for visual artists is unquestionably the more controversal proposal. Whether this is due to the fact money is more clearly involved is impossible to determine. However, for many proponents, there is a single foundation for both issues: a continuing relationship between the artist and the object of his/her creation. While generalizations are axiomatically impossible in describing artists and art, a work of art can be legislatively viewed as a form of personal expression. Each artist can be seen as engaged in a search for invention. Each work is a personal attempt to state something in a new way. Thus, creation and exhibition (and thereafter public appreciation) are intensely personal events. Within the course of creating a final work, failure is far more frequent than success. Under such circumstances, it is hardly unreasonable for artists to seek respect for a continuing connection with the original unique work. And it is not inappropriate for this connection to be economic. Viewed this way, the issue is not one of a collector's unjust enrichment, but rather one of reflecting a joint enterprise between the creator and the early collector.

Indeed it can be said that a guiding principle of copyright law is the grant of some measure of economic control to the creator of unique artisic property by initially and separately imbueing the artist with the exclusive rights to its economic exploitation. For writers, composers, choreographers, performing artists and filmakers, copyright protection allows the owner to derive pecuniary gain from successful distribution of his/her artistic property. As the work becomes of greater public interest and thereby greater commercial value, the writer's (et. al.) financial reward increases proportionatly. Unfortunatly, the intrinsic nature of distribution for most pictoral, graphic, and sculptural works is different. Since as a practical matter reproductions are not significantly marketable, the visual artist must gain his entire return from the initial, onetime sale. In the infrequent but nevertheless important event that the work proves to be a valuable expression, the visual artist shares none of the financial evidence of that particular success. This is especially painful for visual artists because it is their continued effort which supports or even produces that resale value. Were a visual artist to create but a few works and then move on to another endeavor, most likely little appreciation would occur in that work. The usual situation however is that the artist's ongoing activities (even in entirely different immagery or forms of expression) later take hold and cause an increased demand for the earlier work (which may be the most valued of his/her entire oeuvre). The economic effect of this toil is, as regards that earlier work, unrewarded. Such would not be the case with the writer, composer, choreographer, performing artist and filmaker.

This is not to say that current Copyright Law intentionally discriminates against visual atists as a class. Indeed, it is uniform in its application to the distribution of copies of copyrightable works. It is the economic effect which is dramatically different. An amendment to the Copyright law providing for a royalty would simply offer some of the same potential for economic participation that lies with the artists of the other disciplines.

To the extent that copyright protection (and the economic advantages it offers) are an incentive to creative activity, the bill would extend this incentive to visual artists. In addition to promoting creativity itself, copyright laws also encourage the disclosure or publication of that creativity. Except for visual artists, creators of artistic property are inclined to favor immediate distribution with the knowledge that whatever success follows will be beneficial to them. Visual artists are torn by the need to achieve some immediate remuneration against losing forever the opportunity to achieve pecuniary benefits comensurate with future recognition. A resale royalty amendment to the copyright law would greatly reduce the motivation to hold back work from the marketplace. Therefore, it is even resonably predictable that such a law could stimulate more sales of emerging artists' work.

The most frequent refrain in opposition to this advance for visual artists is that the resale royalty rewards the wrong artists with probably inconsequential amounts of money at the wrong time in their lives. While it is unquestonably true that in order to achieve any benefit, the artist must have become somewhat successful, the limited financial impact should hardly be cause to object. Such an argument can even be applied in favor of the legislation pointing to the minimal effect it would have on the marketplace. In this connection, this bill contains a number of improvements on other resale royalty approaches so as to make it the most market sensitive proposal to date. For example, the considerable scaling down of other legislative versions from percentages of gross sales price to a modest 7% of only the appreciation portion of the sale price (and only when the work has appreciated by 40% or more), further minimizes any intrusion into whatever "delicate balance" might be portrayed by opponents.

Finally, it must be noted that as a federal proposal, this bill would avoid any future chaos resulting from state by state enactments. The campaign for a resale royalty for visual artists is one which will not end. If nothing happens on the federal level, various state legislatures will, from time to time, be convinced to codify this idea in one form or another. This would undoubtedly produce problems of overlapping jurisdiction, absurdly inconsistent results based on elusive notions such as "residency", schemes to avoid one state for another, and endless dialogues on perceptions of hostility of one state verses another. A simple, uniform federal law would be an enormous relief.

The moral rights portion of the Kennedy bill seeks to preserve the integrity of the artist's expression and the personality of the artist in being identified with its creation. In addressing integrity the proposal serves a two fold purpose: it establishes the non pecuniary interest of the artist in the continuing availability of his/her expression (in its unadulterated form) and it helps society preserve esthetic property which may inspire and educate future generations.

Our copyright law already partially recognizes one aspect of moral rights; it purports to give the author or artist some control over the initial disclosure of his/her work, even if such control is currently inadequate. However, once disclosure has occured (and in the case of the visual artist, this means for purposes of this discussion a conveyance of the work) the visual artist has no means for protecting the master on which the copyright right of reproduction is most properly exercised. Once again the contrast exists with writers, composers, choreographers, performing artists and filmakers. These authors may retain the master embodiment of their work and sell only copies. The visual artist is required to part with the master (which is the only perfect emodiment of the work). Thus, to insure that the visual artist may possess the separable and meaningful right to reproduce, the right to preserve the master must be granted. As in the case of resale royalties, it is the right of integrity which is needed for visual artist to have the same abilities that other authors (of other disciplines) have in regard to the continuing nature of their work.

While much has been said to the effect that a moral right of integrity may run contrary to fundamental principles of ownership of property, there are enumerable instances where government has put restrictions on the use of property. In the instant situation, an owner of a work will continue to have the complete and unrestricted right of physical possession and personal enjoyment. Moreover, there are no affirmative conservation responsibilities placed on the owner as such. Only intentional or grossly negligent conduct would constitute enfringement. Therefore, the onus is solely on the artist to pursue any claim. When one considers the practical difficulties of prevailing on unmeritorious claims, the right of integrity would not appear to be a significant intrusion into the current law regarding the ownership of personal property.

Nor is this restriction on ownership completly unjustified by historical jurisprudence. There are many precedents in the laws of other nations, the laws of some of our states, and in the decisions of courts using either common law principles or other federal statutes (e.g. Section 43(a) of the Lanham Act). Moreover, and perhaps more importantly, a significant source or basis is provided in the Berne Copyright Union Convention which states (Article 6 bis, paragraph 1): "Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".

Preservation is also a goal which directly benefits society. Indeed there are many who speak poetically about visual art as a gift to society and how that donation enhances our environment and inspires future generations. Accordingly, some legislative efforts have understandably sought to provide for public standing to sue as a means of preserving the integrity of works of art. Alternatively, it is sometimes urged that preservation should be Obviously, the Kennedy bill is a more restrained approach placing the responsibility solely on the individual artist.

The Kennedy bill is also responsive to some previously expressed concerns of conservators and museums. These parties have sympathetically voiced their fear that a broad moral right could be abused by an artist in making unreasonable demands against their legitimate activities. By limiting the right to instances of significant or substantial alteration, the bill eliminates the ability to nit pick. By limiting the right to instances of intentional or grossly negligent conduct, the law would protect those who act responsibly and in good faith. Thus, it can be argued that the proposal presents a reasonable approach.

As in the case of resale royalties, a federal right (properly tied to the copyright law), would avoid the problems that undoubtedly would occur if the issue is left to the states. An excellent example of this can be seen in the different approach presented by New York and California law (two of the four states that currently recognize such rights for visual artists). Since New York approaches integrity as a matter of the artist's reputation and California views the matter as one of preserving property, a work of art could be altered or distorted in New York and subsequently publically displayed in California without creating any liability or providing any grounds for the artist to object. A single federal law is clearly the answer to this and future anomalies.

The provisions regarding paternity and the elimination of copyright notice requirements are plainly and unquestionably steps in a desirable direction. Certainly an artist should be properly cited as the author of his/her work. Concomitantly, the artist should be expressly allowed to disassociate his authorship if the work is no longer a completely acccurate reflection of his/her expression. And there is no reason why an artist's copyright should be subject to forfiture or enforcement difficulties by reason of lapses in needless formalities.

Accordingly, VLA offers its endorsement of S.2796. In doing so it also urges that comments (such as those that VLA has separately submitted) concerning further improvements or indications of unintended errors be welcomed and incorporated into the evolution of this legislation.

In concluding this statement of support, one reservation or word of caution must be expressed. It must be emphasized and prominately noted that the United States Congress is considering legislative adherence to the Berne Copyright Union Convention. Currently pending before the 99th Congress is S.2904 introduced by Senator Charles McC. Mathias, Jr., Chairman of the Judiciary Subcommittee of Patents, Copyrights and Trademarks. For the reasons stated in a preliminary report of the Ad Hoc Working Group on United States Adherence to the Berne Convention (established at the request of the Department of State), adherence to the Berne Convention is the highest legislative priority for benefiting all artists including visual artists. Accordingly, extreme care must be taken to avert any diffusion of energy or to avoid raising controversial Berne related issues before Congress meets the paramount need to pass S.2904.

Senator KENNEDY. Thank you very much.

I just have a few brief questions, and if you want to make any comment on those, we welcome it.

Mr. Harrow, I thought you made a very strong case in describing the basic understanding of American jurisprudence. There ought not only be economic rights, but also the rights in terms of paternity and integrity. And I think that that is something that we as an institution, in the Congress perhaps, had not understood. It is obviously essential in terms of our moving ahead in any form of legislation.

You have been practicing in this area since 1972, I understand?

Mr. HARROW. Yes.

Senator KENNEDY. And I just was interested in your assessment—as somebody who has been a practitioner in this area and who has written and lectured on these questions—how significant are the problems which we address in this legislation within the areas of copyright?

Mr. HARROW. I think they have a significance second to none. And the significance manifests frequently in ways which are not immediately discernible. In terms of concrete issues, I am currently and have represented the sculptor, Richard Serra. The General Services Administration has decided to attempt to relocate his work to another location.

Now, unless one is conversant with the nature of his work, and a great deal of modern abstract sculpture, one would not realize that that work is negated and muted if it is relocated because it is a function of its immediate context. It was designed to express itself as a conjunction with that context. So that in the Government's decision to relocate, there is a rather dramatic misunderstanding of how that would affect, alter, and distort and in fact, destroy the work.

It is easier at times to see the significance of this kind of thing in dealing with art forms that are literary and express themselves verbally because we are so accustomed to that mode of expression. For example, "The Red Badge of Courage", by Stephen Crane, when it was first published, had excerpted parts to diminish its gloominess. Recently a new publication came out which included those excerpted parts, and it is virtually a new book. Recently also a television portrayal of "The Long Hot Summer" was billed as based upon Faulkner's novel. It has virtually no resemblance to the novel.

The author of "Amadeus" has pointed out that in Mozart's important works to change just a few notes impairs the work dramatically. Now we have, very interestingly, this controversy about tinted movies. Hollywood has elected and TV makers have elected to superimpose color on black and white films. Now, formerly technologically black and white preceded color—obviously. But many film makers and photographers elect to work in black and white because that expresses their aesthetic concepts most effectively.

So, to superimpose color distorts their work. And John Huston, the famous director, calls it "as great an impertinence as washing fleshtones on a daVinci painting."

Senator KENNEDY. This gives a very good insight of your view on that issue.

Mr. Bressler, just on one of the matters that we will have to deal with—and that is retroactivity—I wonder if it is inconsistent with the nature of the law at the present time. What would be the effect if someone bought something with the idea that they were going to alter or change it—because that is the state of the law at the present time?

Maybe that is an exceptional case, but how would you deal with that kind of a situation? I mean, the concept of making it retroactive obviously appeals. If you believe in this legislation, it follows that you believe in retroactivity. But how would you come to grips with some of those points that are going to be raised?

Mr. **Bressler**. Your question puts another aspect into my suggestion of retroactivity, and that is that it engraphs the moral rights provision retroactively as well. I think it is a good idea. I think that anybody that has purchased a work in the past for purposes of altering it or distorting it—perhaps the Government can be making a statement and setting a policy. Now, of course, there could be perhaps other constitutional questions——

Senator **Kennedy**. That is the basis of my question.

Mr. **Bressler**. There might very well be a constitutional question there, and that has to be dealt with. But that certainly is one additional aspect to retroactivity.

Senator **Kennedy**. Certainly with regard to notice, there is a clear, compelling case. And there wouldn't be any other kinds of questions in terms of constitutionality.

You may give some thought to that constitutional issue. We are going to run into bugs on this legislation from a variety of different angles. And I imagine this will be one that will be raised and perhaps you can give it some thought—and others.

Mr. **Bressler**. If I can make one other statement in regard to that?

Senator **Kennedy**. Yes.

Mr. **Bressler**. I tried to carve out the two areas of reliance in my proposal where the issue would be resolved. I think that if I could answer a question that hasn't been posed, and that is the affect upon artists of the copyright notice when they have not placed a copyright notice—the problem is rampant. Ninety-five percent of artists do not place notice of copyright on their work, and their work is in the public domain and can be reproduced at will to their detriment.

Senator **Kennedy**. OK.

Mr. Raimondi had talked about some of the provisions and terms of the resale royalty, and raised some questions. I talked a little earlier of what had been established in the area of the services of ASCAP and BMI, and you commented on that. What is your best argument to those that say they ought to work this out in terms of contract price? If it also increases the value they will get for compensation down the road, why isn't that a satisfactory way of dealing with the questions?

Why isn't that the best way to do it rather than establishing this kind of elaborate procedure that this legislation suggests? I don't believe that it would, but for the sake of argument—what is your best argument why that doesn't really reach the essence of what we are concerned about or what we are talking about here?

Mr. GOETZL. Aside from the fact that it may or may not reach that point down the road, my position and the position of the groups that I am here to speak for is that the artists should be entitled to a resale royalty as a consequence of the work that they have done. The fact that a resale of a work at an appreciated price may serve to benefit that artist's career in the long run, the fact that a museum may display a work by the artist, is of no consequence in that respect.

The same argument could have been used again, in connection with the public performance of music, and in fact, was made. Early radio stations sought to argue that they should not to have to pay a royalty to songwriters and composers. After all, the air play of music is going to help the sale of records and sheet music. And it was felt by the Congress then, and I would hope that it would be felt by the Congress now that that is irrelevant. The payment is not for anything but the use of the work, and the fact that the artist's career benefits, is not something that should diminish that payment.

I would also like to comment, if I may, with respect to market sensitivity, which Mr. Koegle referred to. I firmly support the bill as it is. I think it is important to have this resale royalty as a principal. However, I interpret this market sensitivity as rather an approach that would appease some people who might otherwise oppose it. And I am aware of that, I am sensitive to that, and I think that it may be necessary to do that.

However, in principal, I think it is important to observe that the artist should be entitled to a royalty merely because the work has been resold. If the artist had not continued to keep his or her reputation growing, there wouldn't be any market at all. In fact, there is a lot of art which is resold nowhere else but at garage sales.

Let us recall that if a play is performed, the author will be entitled to a royalty even if the producers lost their shirts. Whether there is profit from the use or not is the concern of the person making the use. The fact that there is a use justifies a royalty being paid to the author for the visual arts just as it is in all the other arts.

Senator KENNEDY. Mr. Koegle, we have the basic conflict between moral rights and property rights—what is your best thought about how to deal with that issue as we follow this process forward?

Mr. Koegle. Well, once before the analogy was given to landmarks preservation, and throughout our legal system we have a number of restrictions on property—the right to use property in a certain fashion—the right to use a handgun. So, I don't see it being any different than Congress saying that in this particular area it is important that we try to preserve works of art and that we respect the right of the artist to do that, even that we put the responsibility on the artist to do that. Government is not going to undertake this massive effort to try and do this. Thus, we simply will allow the artist to do that for us.

Senator KENNEDY. I think the point that you make is well taken. We find limitations in environmental law, for example, in terms of toxic waste issues, and also with the basic concept of historical landmarks. Public policy affirms decisions that these resources ought to be preserved. So, I think that is an important point.

I want to thank all of you very much. And I want to indicate both to this and other panels, because of the time we are going to submit some additional questions. We don't want to unduly burden the witness in terms of their workload, but there have been a number of matters that have come up during the course of these hearings on which we would like to follow up.

Our next panel, Ron Feldman, Feldman Gallery, New York.

Mr. Feldman, we are delighted to have you here.

STATEMENT OF RON FELDMAN, FELDMAN GALLERY, NEW YORK

Mr. **Feldman.** I am Ron Feldman, and I am the co-director of Ronald Feldman, Fine Arts, an art gallery in New York City which shows contemporary art.

Historically we are at a very special moment in our history. The United States has become the center of the art world. This moment has often been compared to the Renaissance, but I think that in some ways this is misleading. We have a totally different system of patronage. This has allowed artists the freedom to produce work containing the subject matter of their own choosing, and to render this in any manner they choose. At the same time this often causes difficulties for artists, controversy, no sales, and loneliness.

The art world is immersed and surrounded by an enormous amount of hype—hot artists, high prices, etc. Art seems to be usurped for many purposes within our society. For example, we can find Leonardo daVinci selling anything from pizza to photocopies to car seats. In the latter case, behind the car seat are fake Leonardo drawings manufactured to look like Leonardo drawings.

Stonehenge sells insurance and other products; the Statue of Liberty, which started out as a homage to the artist's mother and has become a cherished universal monument to freedom and diversity, was recently for sale to anyone who wanted to pay for it.

Underneath this hype are real issues and real questions concerning the welfare of individual artists. A law to provide artists with residual monetary income upon the resale of their work is a very important and timely piece of legislation. First, as Larry Rivers said, to show that we respect what artists do, and second, to increase their livelihoods.

I would caution, however, that we should analyze carefully the California law, which in my experience is avoided as much as possible, and seems not to be enforced. We need to find the proper mechanism to make it work. The law must be simple and fair in order to be respected.

I would like to address the remainder of my remarks to the provisions of the bill that protect art from mutilation. A Noguchi sculpture, which was placed in a bank in New York City, was cut in half when the bank decided to remove it. It reminded them of an erect phallus. Noguchi could not do anything about its removal. New York State passed a law which now entitles artists to publish a disclaimer of authorship of an art work if it is altered in any way. Prior to his death in January of this year, Joseph Beuys, a leading German artist, invoked this law and published a disclaimer of authorship in the New York Times. It stated that he denied authorship of any components of a work titled, "Is It About A Bicycle?", which consisted of 15 blackboards, if any of the blackboards were sold separately. Although the exhibition contained all 15 blackboards, there were at least five owners of individual blackboards. It was very clear that all might go to separate owners. This disclaimer of authorship seems to have been very successful, and we hope that shortly this piece will be properly reunified. This artist was able to use a law which will now be greatly expanded.

Beuys also put a different ad in the New York Subway system—"creativity equals capital." It seems to me that this legislation is a bold and important step that recognizes this idea, and makes it central to our culture.

Thank you.

[Submissions of Mr. Feldman follow:]

PREPARED STATEMENT OF RONALD FELDMAN

Comments re: "Visual Artists Rights Amendment 1986"

Unlike writers or rock stars, visual artists have no royalty income from the continuing resale of their works. In addition, although there are organizations representing artists, it would appear that the vast majority of artists belong to no central organization. This law addresses several of the problems encountered by artists in earning a living. The intent of this law to provide artists with royalties upon resale of their work is an important step in creating some stability in what can otherwise be a financially disastrous situation.

The provision of the bill which allows the artist to disclaim authorship of the work is a timely and important step forward in providing the visual artist the same rights as authors. The importance of this cannot be over emphasized. Under New York State Law this is already permitted. I will cite two examples of why this law is needed: particulary, the dismemberment of a Noguchi sculpture in New York, and the separate sale of various components of a Joseph Beuys sculpture. In the Beuys case, he published his disclaimer in The New York Times just prior to his death. There was no other viable remedy available. I intend to very briefly elaborate on these cases, and to speak for under five minutes.

Ronald Feldman

31 Mercer Street, New York, N.Y. 10013, (212) 226-3232

PAULA COOPER 155 WOOSTER STREET NEW YORK 212 674.0766

14 November 1986

Senator Edward M. Kennedy
United States Senate
Washington, D.C. 20610

Dear Senator Kennedy:

Enclosed is the copy of amendments to the copyright law for artists, with notes in the margin. It is important to clarify the difference between limited editions of sculpture which are related in value to paintings and drawings, and multiple editions of sculpture which are related to prints or limited edition graphics.

Protection of the artist regarding mutilation, distortion, alteration, negligence etc. of work is long overdue.

The royalty payments to artists is commendable, but will be difficult to enforce. I think that there should be a sliding scale of percentage increase between purchase and selling price before a royalty be paid from 200% down to 50% as the value increases. The royalty should be equal to 10% of the difference betweeen sellers purchase price and sale price.

Where the artist is deceased at the time of sale and sale occurs within 50 years after the death of artist, such royalty should be paid to the Estate of the artist, not the N.E.A.

We look forward to hearing the final results of your proposed legislation.

Sincerely,

Paula Cooper

Paula Cooper

PC:es

Cast
Sculpture
i.e.: bronze
often in
editions
+ considered
not multiples.
Multiples of
sculptures
regarded
as prints
are to
paintings
(or "unique"
works –)

(1) inserting between the paragraph defining "created" and the paragraph defining "derivative work" the following:

"A 'critical embodiment' as applied to a work of fine art within the category of pictorial, graphic, and sculptural works is one or more of (1) the only copy, e.g., a painting or a sculpture; (2) one of a specifically limited class of copies, e.g., one of a limited edition of fine prints; or (3) a master from which copies can be made, e.g., a mold or photographic negative.";

(2) inserting between the paragraph defining "pictorial works" and the paragraph defining "pseudonymous work", the following:

" 'Price' as used herein, is the aggregate of all installments paid in cash or in-kind for a work.";

(3) inserting between the paragraph defining "publicly" and the paragraph defining "sound recordings", the following:

" 'Sale' and 'resale' as used herein, shall include transactions essentially equivalent to a sale including long-term lease, lease-purchase arrangements, and the like."; and

(4) inserting between the paragraph defining "widow" and "widower" and the paragraph defining

"work of the United States Government", the following:

"A 'work of fine art' is a work of recognized fine art stature. In determining whether a work of fine art is of recognized quality, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art. Evidence of commercial exploitation of a work as a whole or of particular copies, standing alone, does not preclude a finding that the work is a work of fine art.".

SEC. 3. Section 106 of title 17, United States Code, is amended by adding "(a)" before "Subject" at the beginning of the section and adding at the end thereof the following:

"(b)(1) Independently of the artist's economic right in copyright in a pictorial, graphic, or sculptural work of fine art, the artist shall have the right during his life to claim authorship of his works which are publicly displayed or to disclaim authorship of such works because of any distortion, mutilation, or other alteration thereof. This right shall not apply to works made pursuant to contract for trade or advertising use.

"(2) Upon the death of an artist, his estate shall have the exclusive right, up to 50 years after his death, to exercise the rights granted to the artist in paragraph (1) of this subsection.

"(c) Subject to the limitation in section 113(d), the destruction or significant or substantial distortion, mutilation, or other alteration to the critical embodiment or totality of a pictorial, graphic, or sculptural work caused by an intentional act or by gross negligence is a violation of the exclusive rights of the copyright owner where the creator of the work is the copyright owner. Where the artist is not the copyright owner, he shall nonetheless have the exclusive right during his lifetime, and his estate shall have the exclusive right for up to 50 years after his death, to assert infringement of the copyright by distortion, mutilation, or other alteration.

"(d)(1) Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay to the artist or to the artist's agent, a royalty. Where the artist is deceased at the time of the sale, and the sale occurs within fifty years after the death of the artist, such royalty shall be paid to the estate of the artist ~~National Endowment for the Arts for use in the~~ visual arts program. Such royalties shall be in addition to and not a substitute for, appropriated funds for the Visual Arts Fellowship program. Such royalty shall be equal to 7 percent of the difference between the seller's purchase price and the sale price or the fair market value of any property received in exchange for the work. The right of the artist to receive this royalty may not be waived. An artist may assign the right to collect this royalty payment, provided however, such assignment shall not have the effect of creating a waiver prohibited by this subsection. Failure of a seller to pay the artist a royalty due under this section shall constitute an infringement of the copyright.

"(2) Paragraph (1) shall not apply to the following:

"(A) The resale of a work for a gross sales price of less than $500, or in exchange for property with a fair market value of less than $500.

"(B) The resale of a work for a gross sale price of less than 140 percent of the purchase price paid by the seller.

Sliding scale 20% down to 5% as value increases.

"(e) Any artist seeking royalty payments for the sale of his work must register with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation.

"(f) All sales or other transfers of pictorial, graphic, or sculptural works by registered artists must be registered by the seller or transferor with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation. For transfers involving sales or exchanges, such registration shall include the title of the work, name and address of the buyer and seller, the date of sale, the seller's purchase price, and the sale price or fair market value of any property received in exchange for the work.

"(g) Failure of a transferor or a seller of a pictorial, graphic, or sculptural work by a registered artist to register such transfer or sale with the Copyright Office shall constitute an infringement of copyright.".

SEC. 4. Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d)(1) If a pictorial, graphic, or sculptural work of recognized quality cannot be removed from a building without distortion, mutilation, or other alteration of such work, the artist's rights under subsections (b) and (c) of section 106, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, in the applicable State real property registry for such building, prior to the installation of such work, shall be deemed waived. Such instrument, if recorded, shall be binding on subsequent owners of such building.

"(2) If the owner of a building wishes to remove a pictorial, graphic, or sculptural work of recognized quality which is a part of such building but which can be removed from the building without substantial harm to such work, the artist's rights under subsections (b) and (c) of section 106 shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within ninety days either to remove the work or to pay for its removal. If such work is removed at the expense of the artist, his heir, legatee, or personal representative, title to such work shall be deemed to be in such person.".

SEC. 5. Section 401 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d) The provisions of this section shall not apply to pictorial, graphic, or sculptural works of fine art.".

SEC. 6. The criminal penalties provided by section 506 of title 17, United States Code, shall not apply to infringement of the rights created in section 106 (b), (c), and (d) of such title.

SEC. 7. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

Senator KENNEDY. Thank you very much, Mr. Feldman.

Can I ask you just one question—a good amount of discussion centers on the issue of artists royalties about the impact in the market for visual arts. What is your sense of that?

Mr. FELDMAN. Well, I think that we know that rock stars, writers, receive a royalty every time a work of theirs is either played or sold. In theory there should be no difference in the sale of an art work, but in practice there is a difference. When I buy a book or a record, I don't feel singled out to pay a royalty. It is collected in a central place and paid directly to the author via a contract that he or she has with a publisher. We have a multitude of buyers contributing almost unknowingly or even willingly to the creative individuals.

In the art field, however, we have one specific collector, museum, or dealer selling one work of art to one individual. The individual seller is being solely taxed. I think that this kind of sale is equated to the sale of a house or let's say personal property—diamonds, jewelry, and so on. This leads to difficulties. I think the problem with the California law is that the seller is publicly identified.

This law, which is desperately needed, must take into account the marketplace, that is that you can't start with a value that is too low. The 40 percent appreciation also seems to me to be too low. Appreciation can be much greater than that. The law must be fair and administratively feasible or young artists may suffer. Collectors may say: "Why take a chance on this, my ownership is encumbered. In addition to IRS I must also report this to someone for royalty purposes. They have to know and isolate every transaction I make." When I buy a book, this is not reported to anyone—or when I buy a record, I can listen to any record I want. I can have pornography in my home—no one knows it. It is my business. Here the seller is publicly identified.

When I buy or sell a particular art work, if I have to register it, someone knows about it other than the IRS. I feel that this law needs to be carefully analyzed so that it does not become a bureaucratic burden in the marketplace.

Senator KENNEDY. Thank you very much.

We also have a statement by Paula Cooper, and we will make that a part of the record.

Our final panel is Jack Golodner, who is the Director of the Department of Professional Employees, AFL-CIO; Jim Minden, who is the Treasurer of Artists Equity; Roy Gussow, President of New York Artists Equity; and Gil Brown, President of American Institute of Conservation.

This will be our final panel, and let's see if we can conclude as close to 12:00 as possible.

STATEMENTS OF JACK GOLODNER, DIRECTOR, DEPARTMENT OF PROFESSIONAL EMPLOYEES, AFL-CIO; JAMES MINDEN, TREASURER, ARTISTS EQUITY: ROY GUSSOW, PRESIDENT, NEW YORK ARTISTS EQUITY; AND ALBERT GILSON BROWN, PRESIDENT, AMERICAN INSTITUTE FOR CONSERVATION

Mr. GOLODNER. Mr. Chairman, thank you very much. I will try to be brief. You have my statement, and I have asked that it be placed in the record.

I am Jack Golodner. I am director of the Department for Professional Employees, AFL-CIO, and I am here today to register the Department's support for the objectives of S. 2796. The Department comprises 27 national and international unions, and represents approximately 3 million professional and technical employees. Among these people are performing artists—actors, musicians, singers, dancers—and the craft and technical workers who support them, as well as teachers, engineers, social workers, nurses, and so forth. Indeed our Department's affiliates represent the practitioners of every major profession and technical occupation practiced in this country.

The Department has a long history of seeking improvements in our copyright laws, which will keep them in tune with the changing technology and changing society, while protecting our Nation's most creative workers. The most recent example of our support for such legislation is the Home Audio Recording Act, S. 1739, of which you, Mr. Chairman, are the principle cosponsor. As you know, this most important measure was approved by this subcommittee in the last session. And we are hopeful that it will receive the favorable consideration it deserves in the next Congress.

Although superficially there might appear to be little relationship between the Home Audio Recording Act and the Visual Artists Rights Amendment, I would submit that in fact the two bills have much in common. Both are directly responsive to the purposes underlying the copyright clause of the Constitution. As stated, those purposes are to promote the arts and sciences, and thus advance culture and enhance the economy. It rests on the well-established proposition that the arts and sciences flourish best when creativity is recognized, protected, and adequately rewarded. And it is this underlying proposition which links the Visual Artists Rights Amendment, and the Home Audio Recording Act, and other copyright legislation, which we have supported in recent years. Each bill recognizes the creativity of the artists, and grants them the rights which will protect and reward their creativity, and encourage further endeavors on their part.

The 1965 legislation creating the National Endowment for the Arts states:

> It is necessary and appropriate for the federal government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent.

Despite this statement of intent, the Arts Endowment has reported that the real earnings of artists declined by 37 percent during the 1970's and that the median annual earnings in 1979 of visual artists—painters, sculptors, craft people and print makers—was

$8,576. All signs indicate that these dire circumstances persist in the 1980's.

The United States cannot tolerate a situation where some of its most creative members must live on the fringes of society in near poverty, with little acceptance or recognition. The role of the artist in society is a special one. The relationship of an artist to his or her art is not merely that of individual expression. It is, after all, the artist who describes us for posterity. Artists deserve more from us, therefore, than they are currently receiving.

The objectives contained in the Visual Artists Rights Amendment begin in a reasoned way to address the plight of the visual artists in our society. The bill says to our visual artists that our society recognizes their value and importance; appreciates and wants to protect their unique relationship to their work; and acknowledges that they should participate in the increased value of their creations.

A major and continuing objective of our Department is the encouragement of the creative and intellectual efforts of all workers to enhance the culture, and as a result, promote the well-being of the American people. It is both wise and just to encourage our visual artists and protect their work.

Mr. Chairman, we all commend you for introducing S. 2796, and proceeding to this hearing with such expedition. We look forward to the passage of the objectives embodied in this legislation, and look forward to working with you toward that objective.

[The prepared statement of Mr. Golodner follows:]

PREPARED STATEMENT OF JACK GOLODNER

I am Jack Golodner, Director of the Department for Professional Employees (DPE), AFL-CIO. I am here today to attest to the DPE's support for the objectives of S. 2796 — the Visual Artists Rights Amendment of 1986.

Comprising 27 national and international unions (list attached), the DPE represents approximately 3 million professional and technical employees. Among these employees are performing artists — actors, musicians, singers, dancers — and the craft and technical workers who support them, as well as teachers, engineers, social workers, nurses, pharmacists, librarians, etc. In short, the Department's affiliates represent the practitioners of every major profession and technical occupation.

The DPE has a long history of seeking amendments to our copyright law which will protect the rights and interests of performing artists and other creative workers. The most recent example of our support for such legislation is the Home Audio Recording Act, S. 1739, of which you are one of the principal co-sponsors, Mr. Chairman. Reported out of the Subcommittee on Patents, Copyrights and Trademarks in May 1986 by a vote of 6 to 1, this legislation if enacted, would create a royalty on audio recording devices that make possible the copying of copyrighted sound recordings produced by our affiliates' members. In return for the royalty fee, paid directly by the importers or manufacturers of these audio recording devices, purchasers would be allowed to record copyrighted sound recordings for their personal use. The royalty payments would be distributed among the copyright owners of the sound recordings being taped in the home and the creative artists who produced them, in partial recompense for the earnings they lose as the direct result of the widespread taping of their creations.

Although superficially, there might appear to be little relationship between the Home Audio Recording Act and the Visual Artists Rights Amendment of 1986, I would submit that in fact the two bills have much in common. Both are directly responsive to the purposes underlying the Copyright Clause of the Constitution (Article I, Section 8 Clause 8) which provides that

> The Congress shall have power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

As stated, the purpose of the Copyright Clause is to promote the arts and sciences and thus advance culture and enhance the economy. It rests on the well established proposition that the arts and sciences flourish when creativity is recognized, protected and adequately rewarded. It is this underlying proposition which links the Visual Artists Rights Amendment of 1986, the Home Audio Recording Act and other copyright legislation which the DPE has supported. Each bill recognizes the creativity of the artists to which it applies and grants to those artists rights which will protect and reward their creativity. Of course, the overriding goal is to induce all with creative potential to develop that potential for general benefit.

The 1965 legislation creating the National Endowment for the Arts stated that "... it is necessary and appropriate for the federal government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent." Despite this statement of intent, the NEA has reported that the real earnings of artists declined by 37 percent during the 1970s and that the median annual earnings in 1979 of visual artists who are painters, sculptors, craft artists, and printmakers was $8,576. All signs indicate that these dire circumstances persist in the 1980s.

The United States can not tolerate a situation where some of its most creative members to live on the fringes of society, in poverty or near poverty, with little acceptance or recognition. Furthermore, the role of the artist in society is a special one. The relationship of an artist to his or her art is not merely that of individual expression. It is, after all, the artist who describes us for posterity. Artists deserve more from us than they are currently receiving.

The objectives contained in the Visual Artists Rights Amendment of 1986 begin, in a reasoned way, to address the plight of the visual artist in our society. This legislation would protect the moral rights of artists, giving the visual artist a needed degree of control over his or her creations, thus assuring that artistic integrity can be maintained. Such moral rights are widely recognized abroad and by the states of California, New York and Massachusetts. This legislation would also provide that the visual artist would benefit directly from the appreciated value of his or her work when it is resold. Many other countries already have such provisions for their visual artists. The legislation would also facilitate obtaining copyright protection for the works of visual artists. In summary, the Visual Artists Rights Amendment says to our visual artists that our society recognizes their value and importance, appreciates and wants to protect their unique relationship to their work, and acknowledges that they should participate in the increasing value of their creations.

A major and continuing objective of the Department for Professional Employees, AFL-CIO is the encouragement of the creative and intellectual efforts of all workers to enhance the culture and, as a result, promote the well-being of the American people. It is both wise and just to encourage our visual artists and protect their work. Mr. Chairman, I want to commend you for introducing S. 2796 and proceeding to this hearing with such expedition. We look forward to passage of the objectives embodied in this legislation in the upcoming 100th Congress.

Senator KENNEDY. Thank you very much.

Mr. Minden.

STATEMENT OF JAMES MINDEN

Mr. MINDEN. My name is James Minden, and I am a painter. And as secretary-treasurer, I am here today representing the National Artists Equity Association. National Artists Equity was organized in 1947 by a group of visual artists who recognized that their profession needed an organization through which artists could speak with one voice—particularly in the area of legislation and public policy.

National Artists Equity is the country's only national organization whose primary purpose is to be an advocate for all American visual artists. We have headquarters in Washington, DC, and have seventeen chapters around the country. And we now represent over 5,000 visual artists.

Equity's stance on behalf of artists has encouraged a number of artists' organizations to become affiliates. These organizations include the Boston Visual Artists' Union, the Chicago Artists' Coalition, the National Conference of Artists, the Michigan Guild of Artists and Artisans, the Society for Photographic Education, and the Society of Humboldt (California) Artists.

National Artists Equity comes to this hearing with a long history of work in the area of artists' rights. Equity has been instrumental in the passage of numerous consignment laws, percent for art laws, and other pertinent state laws throughout the country. In addition, National Artists Equity has played a major role in the passage of the country's first moral rights and resale royalty laws, both in California.

The importance of the Visual Artists Rights Amendment is that it recognizes and enforces the fundamental principle that regardless of its ownership and location, an artists' work remains a unique component of a body work that establishes his reputation and furthers his career. That intrinsic relationship an artist has with his work, and from which an artist should benefit both professionally and economically, will remain unprotected without passage of this bill. This amendment offers the same basic protection and economic participation currently afforded artists in other disciplines through copyright law.

This legislation provides for an artist sharing in the economic appreciation of his work, protects against the intentional alteration and destruction of work, and provides the full protection of copyright law without an undesirable notice on the work.

We have been gratified, Senator, by your willingness to work with us and other artists organizations, and to listen to suggestions for strengthening of the bill. While strongly supporting this bill and the concept of resale royalties, National Artists Equity recommends that in light of the varying opinions in determining an appropriate and fair percentage, that a thorough analysis of the royalty calculations should be undertaken.

There is also a need for the registration procedures called for in this bill to be clarified and more fully considered. We must all feel that these are essential and workable to a royalty system. Also, though it is noble to consider that uncollectable funds could go to the National Endowment Visual Arts Program, we feel that this concept, which we assume was modeled after the California law, should not apply to resales of work by artists no longer living. The right to resale royalties should, upon death, transfer to the artist's estate, as it does with copyright and moral rights provision of this bill for up to fifty years after the artist's death.

The concept of cultural heritage is the underlying purpose of the Visual Artists Rights Amendment, however, we will have no heritage in the future without artists producing art in the present. The protection of the artists moral right and copyright—coupled with the ability to receive an economic benefit from the resale of work—can only result in a society conducive to the creation of art. And, therefore, National Artists Equity vigorously endorses its passage.

Senator **Kennedy**. Thank you very much.

STATEMENT OF TAD CRAWFORD ON BEHALF OF THE GRAPHIC ARTISTS GUILD COUNCIL AND THE SOCIETY OF ILLUSTRATORS AND MAGAZINE PHOTOGRAPHERS

Mr. **Crawford**. Mr. Chairman, my name is Tad Crawford. I speak here for the more than 10,000 members of the American Society of Magazine Photographers, the Graphic Artists Guild, and the Society of Illustrators. The work of these image makers surrounds us as an essential part of our daily culture.

It is both wise and just that our nation should protect its creators and their art as so many of the world's art-rich nations have already done. For this reason, we support the principles which are embodied in S. 2796, the Visual Artists Rights Amendments of 1986.

There are certain issues which I would respectfully ask the subcommittee to consider so this concerned and enlightened legislation best serves both our society and its artists.

It is not clear whether S. 2796 would permit an artist to waive the rights of authorship credit and preserving the integrity of the art. Knowing how one-sided most negotiations are between artists and art buyers, I would suggest that the bill explicitly state that these rights cannot be waived.

The present bill does not appear to protect reproductions of art, such as illustrations in a magazine. Why shouldn't art like Norman Rockwell's magazine covers find protection under the moral rights law? Or Larry River's Liberty piece published in Vanity Fair? One period's commercial art is often deemed the fine art of a later time.

Any moral rights law is grounded on authorship. Yet fine artists as well as commercial artists face the risk that any commissioned work may prove to be work for hire. In such a case, the artist will lose not only the copyright, but all moral rights as well. This violates the intent of Congress in the 1976 copyright law and presents a serious obstacle to S. 2796.

It would also be wise either to protect all works of visual art, or to clarify the meaning of "recognized fine art stature" so that this is deemed a minimal standard. Artists will not be able to afford complicated litigation requiring extensive expert testimony to establish their right to protection under this amendment.

I would ask that my written testimony be made part of the record of this hearing, and I thank you, Mr. Chairman, for the opportunity to testify here and for your support of the artists.

[The prepared statement of Mr. Crawford follows:]

PREPARED STATEMENT OF TAD CRAWFORD

My name is Tad Crawford. I am submitting this statement in support of the Visual Artists Rights Amendment of 1986 on behalf of the American Society of Magazine Photographers, the Graphic Artists Guild, and the Society of Illustrators. These organizations have a membership of more than 10,000 highly talented professionals in the field of visual communications. Their members include photographers, illustrators, graphic designers, cartoonists, textile designers, and others who earn their livelihood by the creation of visual imagery. The work of these image makers surrounds us an an essential part of our daily culture. Book jackets, magazine covers, advertisements, packaging for products, and textile designs only begin the enumeration of how the images created by their members are disseminated.

My own background as an attorney includes drafting state legislation on behalf of visual artists such as the Artists' Authorship Rights Law enacted by New York State in 1983. I am also the author of the book Legal Guide for the Visual Artist and have taught "Law and the Visual Artist" at the School of Visual Arts in New York City.

In 1990 we will celebrate the two hundredth anniversary of our federal copyright law. Looking backward, we see how our copyright law has evolved to give ever greater protection to authors. Modes of authorship undreamed of in 1790, such as photography, records, motion pictures, and television, have been protected. Looking ahead, we see technology continuing to revolutionize the field of communications. In the visual arets, computers can be programmed to digitize, store, and transform visual images. The possibilities that art will be distorted or authorship unacknowledged increase with this technology. To recognize authorship and guard the integrity of what is authored serve not only the artist or author, but society as well.

Yet our current copyright law - called a creators' law when it first took effect in 1978 - is flawed in several important respects. Because of the work for hire provisions, our law does not always recognize and reward the true author of a work. And, despite innovative state laws in New York, California, and Massachusetts, we do not have a moral rights law to protect fully both the integrity of art and the right to receive authorship credit. It is this shortcoming that S.2796 seeks to remedy. It is both wise and just that our nation should protect its creators and their art as so many of the world's art-rich countries have already done.

The relationship of an artist to his or her art is not merely an individual expression. The artist surfaces the symbols of his or her society and manifests in art the constant transitions of a culture. Meeting this task may make the artist's life a difficult one. As C.J. Jung stated, the artist is "a vehicle and moulder of the unconscious psychic life of mankind. That is his office, and it is sometimes so heavy a burden that he is fated to sacrifice happiness and everything that makes life worth living for the ordinary human being."

What does our government offer those who risk the sacrifice of happiness and material rewards? Perhaps the most important grant is the status of being an author. This flows from the Copyright Clause of our Constitution: "The Congress shall have the power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Many American artists simply assume that even after a sale they have a right to be credited as the creators of their art and should still have control over how their art is displayed. These are the most important components of what is called droit moral: moral rights widely recognized abroad. In fact, the protections for the American artist are limited and often unsatisfactory. Some legal commentators have argued that American laws relating to unfair competition, trademarks, right to privacy, protection against defamation, right to publicity, patents and copyright amount to a satisfactory equivalent of moral rights. The better view is that this body of law does not at all approach the protections offered to creative people and their work under specially designed moral-rights provisions such as those contained in S.2796.

The states of California, Massachusetts, and New York have enacted quite different laws to protect moral rights, but no federal legislation offers this protection which many other countries give to artists. The moral rights suggested, for example, under the Berne Copyright Convention, to which the United States is not a signatory, provide that "the author9 shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to said work, which would be prejudicial to his honor or reputation."

S.2796 provides for the moral right of paternity, "the right during his life to claim authorship of his works which are publicly displayed or to disclaim authorship of such works because of any distortion, mutilation, or other alteration thereof." It is to be hoped that enactment of S.2796 would change the holding of a famous American case involving the artist Alberto Vargas and Esquire magazine.

Vargas created a distinctive series of drawings of women over which Esquire acquired complete ownership by contract. For more than five years, Esquire had given Vargas credit as creator of the illustrations, although the contract itself did not provide for him to receive any such credit. After Vargas and Esquire had a falling out in 1946, the magazine changed the title on the remaining drawings it owned to "Esquire Girls" and gave no credit line at all to Vargas. Vargas sued, but the court decided that Vargas could not claim an implied right to receive authorship credit.

S.2796 also provides for the moral right of integrity by giving the artist or his estate a cause of action for "distortion, mutilation, or other alteration." The right of integrity is well illustrated by a leading French case involving six panels of a refrigerator painted by Bernard Buffet. It was Buffet's intention that the refrigerator be exhibited as a whole. Accordingly, he only signed one of the six panels. Within six months of the first auction, however, one of the panels was offered for sale at a second auction under the description of a painting on metal by Buffet.

Buffet brought suit to prevent the sale of the panel separately and to have the entire work returned to him. The court upheld him to the extent that it refused to allow the panel to be sold separately in either a public or private sale, but the private owner was allowed to keep the work. Buffet also received one franc as a symbolic vindication, the right to have the court's decision published in three art journals of his choice at the defendant's expense, and the court costs.

Many countries give artists a percentage of proceeds fromE sales of their work, even when the artists no longer own the work. California has already enacted such a law. By making such a law federal, S.2796 will support authorship in the visual arts in a new and significant way.

S.2796 would greatly benefit artists by no longer requiring copyright notice for "pictorial, graphic, or sculptural works of fine art." In some ways the visual arts are a stepchild of the copyright law. Added late to the statutory categories covered by copyright, visual arts works do not easily fit into a statutory structure created for books. Works of visual art often lack proper copyright notice and seldom are registered. S.2796 takes cognizance of this reality and seeks a fair remedy.

The advantage of moral rights is that they are designed specifically for creative works. This alone would make moral rights superior to the remedies that now exist in the United

States. There are certain issues which I would respectfully ask the Subcommittee to consider so this concerned and enlightened legislation best serves both our society and its artists.

It is not clear to me whether S.2796 would permit an artist to waive the rights of paternity and integrity. Knowing how one sided most negotiations are with artists, I would suggest that the bill explicitly state that these rights cannot be waived.

The present bill does not appear to protect reproductions of art, such as illustrations in a magazine. The organizations which I speak for today have memberships which make art almost exclusively for reproduction. It is of great importance to these artists that they receive authorship credit and not have their work distorted when reproduced for the public. Why shouldn't art like Norman Rockwell's magazine covers find protection under the moral rights law? If reproductions are protected, there should also be a clarification and limitation of the language in the bill stating,"This right shall not apply to works made pursuant to contract for trade or advertising use."

Any moral rights law is grounded on authorship. Yet fine artists as well as commercial artists face the risk that any commissioned work may prove to be work for hire. In such a case the artist will lose not only the copyright, but all moral rights as well. This violates the intent of Congress in the 1976 copyright law and presents an obstacle to S.2796 fully realizing its objectives for both artists and our society.

It would also be wise either to protect all works of visual art or to clarify the meaning of "recognized fine art stature" so that this is deemed a minimal standard. Artists will not welcome or be able to afford complicated litigation requiring extensive expert testimony. It would also be wise to specify whether the artist who wins a lawsuit will be entitled to damages, injunctions, court costs, attorney's fees, and perhaps even the return of art which has been mutilated.

The copyright notice requirement should be removed for all pictorial, graphic, and sculptural works, not merely those "of fine art." This is important, since litigation will be necessary to know which works are "of fine art" and this will force everyone to continue using copyright notice as a precaution. It would also be a great benefit to artists, who rarely register their art, if the bill eliminated the requirement that art must be registered prior to infringement in order for the artist bringing a lawsuit to be eligible for statutory damages and attorneys' fees.

What a marvel it would be if by 1990 we could celebrate a copyright law that truly protects authorship. If moral rights and an art resale proceeds law were enacted, work for hire reformed, and other changes made to bring works of visual art more fully within the system of copyright, that would be a bicentennial celebration indeed!

Senator KENNEDY. Thank you.

STATEMENT OF ALBERT GILSON BROWN

Mr. BROWN. My name is Albert Gilson Brown. I am the executive director of the American Institute for Conservation of Historic and Artistic Works, a professional society whose 2,500 members include professional practicing conservators, conservation scientists, administrators and educators.

We appreciate this opportunity to testify on S. 2796, and I am here today speaking on behalf of the institute. Joining me today is Edward J. Sack, an attorney whose wife, Susanne P. Sack, is a conservator and president of the International Institute for Conservation.

I will briefly summarize our position as contained in our written testimony. On the whole, we support the intent of S. 2796 to protect and safeguard works of art from destruction or mutilation. This is clearly a goal of conservation. Namely, to preserve the integrity of historic and artistic works. We do have a problem with language in the bill which would prohibit alteration by an intentional act. Conservation consists of intentional acts designed to protect artistic and historic works for the present and future generations.

The acts are intended to restore and preserve, and are expected to be reversible whenever possible. And to be done in consultation with the original artist whenever this is possible.

We do not believe it is the intent of S. 2796 to prohibit this kind of activity, therefore, we request that the legislation contain an exemption for conservation. And we have suggested language to this end in our written testimony on page 3.

I would like to submit an additional document for your review and consideration this morning. This document is the American Institute for Conservation's Code of Ethics and Standards of Practice. This document sets forth what the institute expects member conservator practitioners to abide by in their conservation activities.

I would like now in the remaining time to ask Mr. Sack to comment briefly on some legal aspects of this bill.

[The prepared statement of Mr. Brown and additional material follow:]

PREPARED STATEMENT OF ALBERT GIBSON BROWN

MY NAME IS **ALBERT GILSON BROWN**. I AM THE EXECUTIVE DIRECTOR OF THE AMERICAN INSTITUTE FOR CONSERVATION OF HISTORIC AND ARTISTIC WORKS (HEREAFTER REFERRED TO AS **AIC**). I AM HERE TODAY TO TESTIFY ON AIC'S POSITION ON S. 2796. JOINING ME IS **EDWARD J. SACK**, AN ATTORNEY WHOSE WIFE, **SUSANNE P. SACK**, IS A CONSERVATOR AND PRESIDENT OF THE INTERNATIONAL INSTITUTE FOR CONSERVATION.

AIC IS A PROFESSIONAL SOCIETY WHOSE PURPOSE IS:

> "TO PROVIDE AN ORGANIZATION TO COORDINATE AND ADVANCE THE KNOWLEDGE AND IMPROVED METHODS OF CONSERVATION NEEDED TO PROTECT, PRESERVE AND MAINTAIN THE CONDITION AND INTEGRITY OF OBJECTS OR STRUCTURES WHICH BECAUSE OF THEIR HISTORY, SIGNIFICANCE, RARITY OR WORKMANSHIP HAVE A COMMONLY ACCEPTED VALUE AND IMPORTANCE FOR THE PUBLIC INTEREST." (BYLAWS, SECTION I, PARAGRAPH 2A.)

ITS 2500 MEMBERS INCLUDE PROFESSIONAL CONSERVATORS, SCIENTISTS, ADMINISTRATORS, EDUCATORS, STUDENTS AND CULTURAL INSTITUTIONS. THESE INDIVIDUALS PERFORM CONSERVATION WORK IN MUSEUMS, GALLERIES, LIBRARIES, UNIVERSITIES, AND PRIVATE CONSERVATION LABORATORIES THROUGHOUT THE UNITED STATES. THEIR FIELD OF ENDEAVOR ENCOMPASSES A WIDE RANGE OF CULTURAL PROPERTY INCLUDING PAINTINGS, BOOKS AND MANUSCRIPTS, DECORATIVE ARTS, ARCHAEOLOGICAL AND ANTHROPOLOGICAL OBJECTS, SCULPTURE, TEXTILES, PHOTOGRAPHIC MATERIALS, WOOD ARTIFACTS, AND OTHER OBJECTS OF ARTISTIC AND HISTORIC VALUE.

WE SUPPORT THE INTENT OF THE BILL TO PROTECT AND SAFEGUARD ARTISTIC AND HISTORIC WORKS FROM DESTRUCTION OR MUTILATION. THIS IS A GOAL OF CONSERVATION. HOWEVER, WE DO NOT AGREE WITH LANGUAGE IN THE CURRENT VERSION OF THE BILL PROSCRIBING DISTORTION AND ALTERATION. WHAT IS AN ALTERATION , WHICH IS NOT A MUTILATION, TO BE COVERED BY THE ACT? WE FEAR THAT THIS VAGUE LANGUAGE MAY BE INTERPRETED TO INCLUDE THE LEGITIMATE PRACTICE OF CONSERVATION. SPECIFICALLY, THE BILL PROVIDES THAT ALTERATION OF

A WORK OF ART BY AN INTENTIONAL ACT IS A VIOLATION OF THE EXCLUSIVE RIGHTS OF THE COPYRIGHT OWNER. CONSERVATION CONSISTS OF INTENTIONAL ACTS INTENDED TO PROTECT ARTISTIC AND HISTORIC WORKS FOR THE PRESENT, AND FOR FUTURE GENERATIONS. THERE ARE TIMES WHEN THIS ACTIVITY ALTERS THE APPEARANCE OF A WORK FROM ITS PRE-TREATMENT CONDITION. A CONSERVATOR SHOULD NOT HAVE TO FEAR THAT AN ARTIST, OR HIS REPRESENTATIVE, MIGHT ASSERT THAT A TREATMENT PRODUCED AN ILLEGAL ALTERATION OF A WORK. SINCE THIS IS NOT THE INTENT OF THE BILL, AIC RECOMMENDS AN EXEMPTION FOR CONSERVATION.

AIC DEFINES CONSERVATION AS FOLLOWS:

> "THE TERM 'CONSERVATION' SHALL MEAN EXAMINATION (ACTION TAKEN TO DETERMINE THE NATURE OR PROPERTIES OF MATERIALS AND THE CAUSES OF THEIR DETERIORATION AND ALTERATION), RESTORATION (ACTION TAKEN TO CORRECT DETERIORATION AND ALTERATION), AND PRESERVATION (ACTION TAKEN TO PREVENT, RETARD OR STOP DETERIORATION)." (BYLAWS, SECTION I, PARAGRAPH 2A.)

WE SUBMIT THE FOLLOWING LANGUAGE FOR INCLUSION IN THE BILL, WHICH WOULD PROVIDE AN EXEMPTION FOR CONSERVATION ACTIVITIES:

> "ALTERATION OR MODIFICATION OF A WORK OF FINE ART WHICH IS THE RESULT OF CONSERVATION TREATMENT WILL NOT CREATE A VIOLATION OF THE EXCLUSIVE RIGHTS OF THE COPYRIGHT OWNER OF THE WORK OF FINE ART OR THE RIGHTS OF THE ARTIST OR HIS ESTATE."

IN SUMMARY, IF YOU ACCEPT THIS CHANGE THE BILL WILL BE ACCEPTABLE FOR CONSERVATION. HOWEVER, WE EXPRESS NO OPINION ON THE REST OF THE BILL BECAUSE IT IMPACTS ON MUSEUMS, COLLECTORS, DEALERS, AND OTHERS IN THE ART FIELD, AND WE CANNOT SPEAK FOR THEM.

THANK YOU FOR THE OPPORTUNITY TO EXPRESS AIC'S VIEWS.

EXHIBIT # 1

Code of Ethics and Standards of Practice

Introduction

The first formulation of a code of ethics for art conservators, adopted by the members of IIC-American Group (now AIC) at the annual meeting in Ottawa, Canada, on May 27, 1967, was produced by the Committee on Professional Relations: Sheldon Keck, Chairman, Richard D. Buck, Dudley T. Easby, Rutherford J. Gettens, Caroline Keck, Peter Michaels and Louis Pomerantz.

The first formulation of standards of practice and professional relationships by any group of art conservators was produced by the IIC-American Group (now AIC) Committee on Professional Standards and Procedures under the direction of Murray Pease, Conservator, Metropolitan Museum of Art. Other members of the committee were Henri G. Courtais, Dudley T. Easby, Rutherford J. Gettens, and Sheldon Keck. The report was adopted by the IIC-AG at the annual meeting of the group in New York on June 8, 1963. It was published in *Studies in Conservation*, Vol. 9, No. 3, August 1964, pp. 116–121. The primary purpose of this document was to provide accepted criteria against which a specific procedure or operation can be measured when a question as to its adequacy has been raised.

The responsibility of revising and updating the original code of ethics and standards of practice and professional relationships was assigned to the AIC Committee on Ethics and Standards: Elisabeth C. G. Packard, Chairman, Barbara H. Beardsley, Perry C. Huston, Kate C. Lefferts, Robert M. Organ, and Clements L. Robertson.

The original format has been retained except that the more general *Code of Ethics* has been placed first as Part One, followed by *Standards of Practice* as Part Two.

The revised versions were adopted by the Fellows of AIC at the annual meeting in Toronto, Canada on May 31, 1979.

Elisabeth C. G. Packard, Chairman
Ethics and Standards Committee, 1977–79

Amended, May 24, 1985

PART ONE—CODE OF ETHICS

I. PREAMBLE

Conservation of historic and artistic works is a pursuit requiring extensive training and special aptitudes. It places in the hands of the conservator* cultural holdings which are of great value and historical significance. To be worthy of this special trust requires a high sense of moral responsibility. Whether in private practice or on the staff of an institution or regional center the conservator has obligations not only to the historic and artistic works with which he** is entrusted, but also to their owners or custodians, to his colleagues and trainees, to his profession, to the public and to posterity. The following code expresses principles and practices which will guide the conservator in the ethical practice of his profession.

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*Hereafter in the text the word "conservator" also denotes "conservation scientist" when applicable.

**In this text "he" and related pronouns are used in the classical sense to denote the person, male or female.

II. OBLIGATIONS TO HISTORIC AND ARTISTIC WORKS

A. Respect for Integrity of Object

All professional actions of the conservator are governed by unswerving respect for the aesthetic, historic and physical integrity of the object.

B. Competence and Facilities

It is the conservator's responsibility to undertake the investigation or treatment of an historic or artistic work only within the limits of his professional competence and facilities.

C. Single Standard

With every historic or artistic work he undertakes to conserve, regardless of his opinion of its value or quality, the conservator should adhere to the highest and most exacting standard of treatment. Although circumstances may limit the extent of treatment the quality of the treatment should never be governed by the quality or value of the object. While special techniques may be required during treatment of large groups of objects, such as archival and natural history material, these procedures should be consistent with the conservator's respect for the integrity of the objects.

D. Suitability of Treatment

The conservator shall not perform or recommend any treatment which is not appropriate to the preservation or best interests of the historic or artistic work. The necessity and quality of the treatment should be more important to the professional than his remuneration.

E. Principle of Reversibility

The conservator is guided by and endeavors to apply the "principle of reversibility" in his treatments. He should avoid the use of materials which may become so intractable that their future removal could endanger the physical safety of the object. He also should avoid the use of techniques, the results of which cannot be undone if that should become desirable.

F. Limitations on Aesthetic Reintegration

In compensating for damage or loss, a conservator may supply little or much restoration, according to a firm previous understanding with the owner or custodian and the artist, if living. It is equally clear that he cannot ethically carry compensation to a point of modifying the known character or the original.

G. Continued Self Education

It is the responsibility of every conservator to remain abreast of current knowledge in his field and to continue to develop his skills so that he may give the best treatment circumstances permit.

H. Auxiliary Personnel

The conservator has an obligation to protect and preserve the historic and artistic works under his care at all times by supervising and regulating the work of all auxiliary personnel trainees and volunteers under his professional direction. A conservator should not contract or engage himself to clients as a supervisor or insufficiently trained auxiliary personnel unless he can arrange to be present to direct the work.

III. RESPONSIBILITIES TO THE OWNER OR CUSTODIAN

A. Contracts

Contract practice may permit a conservator to enter into an agreement with individuals, institutions, corporations, or governmental agencies to provide conservation services, provided that the contract or agreement does not contravene the principles of ethics as laid down or implied in this code.

B. Changes in Treatment or Fee

Any changes on the part of the conservator in the contracted planned procedure in treating historic and artistic works, or changes in the fee which has previously been estimated should, unless circumstances intervene, be made known to the owner or custodian and be approved in writing before the changes are effected.

C. Abrogation of Contract
The conservator should understand that an owner or custodian is free to select, without persuasion or admonition, the services of any conservator of his choice of more than one conservator simultaneously, and is also at liberty to change from one conservator to another at his own discretion. However, after a contract, oral or written, has been made for the treatment of a specific object, neither the conservator nor the owner may ethically withdraw from it except by mutual agreement.

D. Proper Course of Treatment
Inasmuch as an owner is rarely competent to judge the conservation requirements of his historic and artistic possessions, the conservator should honestly and sincerely advise what he considers the proper course of treatment.

E. Report of Examination
Before performing any treatment on an object, the conservator should first make an adequate examination and record of condition.* The conservator is obliged to report his findings and recommendations to the owner or custodian or their delegate and await instructions before proceeding.

F. Record of Treatment
A record of treatment* should also be made by the conservator. He has the obligation to record and report in detail to the owner or custodian the materials and methods of procedure employed in treating the object.

G. Punctuality and Expedition
It is the obligation of the conservator to estimate the length of time it will take to complete the treatment and to abide by his contract with reasonable punctuality.

H. Fees
Fees for conservation service should be commensurate with the service rendered, with due regard for fairness to the owner or custodian and to the conservator and for respect for the profession.

In determining the amount of the fee, it is proper to consider (1) time and labor required, (2) costs of materials and insurance, (3) novelty and difficulty of the treatment, (4) customary charges of others for like services, (5) the problems involved in treatment a work of high value, (6) character of the employment—casual or constant client.

An owner's ability to pay cannot justify a charge in excess of the value of the service.

Conservators should avoid charges which overestimate the worth of their services as well as those which undervalue them.

Because of variations in the treatment of similar conditions, it is impossible to establish with mathematical accuracy a set fee for a particular type of service.

I. Warranty or Guarantee
Although the conservator at all times should follow the highest standards and, to the best of his knowledge, the most acceptable procedures, to warrant or guarantee the results of a treatment is unprofessional. This is not to be construed to mean that he should not willingly and freely correct defects or unforeseen alterations which, in his opinion, have occurred prematurely following his treatment.

IV. RELATIONS WITH COLLEAGUES, TRAINEES AND THE PROFESSION

A. Contribution to Profession
A conservator has an obligation to share his knowledge and experience with his colleagues and with serious students. He should show his appreciation and respect to those from whom he has learned and to those who have contributed in the past to the knowledge and art of the profession by presenting

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*Standard procedures for engaging in and reporting of examination and treatment of historic and artistic works are described in Part Two, Section IV and V.

without thought of personal gain such advancements in his techniques of examination and treatment which may be of benefit to the profession. The originator of a novel method of treatment or a new material should make full disclosure of the composition and properties of all materials and techniques employed. The originator is expected to cooperate with other conservators and conservation scientists employing or evaluating the proposed methods or materials. None of the above is intended to infringe upon the proprietary rights of the originator.

B. Trainees and Interns

The conservator, private or institutional, has a responsibility to undertake the training and instruction of apprentices, trainees and interns, but only within the limits of his expert knowledge and the technical facilities available. The rights and objectives of both the trainer and the apprentice should be clearly stated and mutually agreed upon in writing, and should include such items as anticipated length of apprenticeship, areas of competence to be taught and payments.

C. References

A conservator should not recommend or provide a reference for a person applying for a position as a professional conservator unless the conservator has personal knowledge that the applicant's training, experience and performance qualify him for the position.

D. Intermediaries

The professional services of a conservator should not be controlled or exploited by any agency, personal or corporate, which intervenes between client and practitioner; the conservator's responsibilities and qualifications are individual and personal. He should avoid all relationships which direct the performance of his duties by or in the interest of such intermediary. This does not preclude his working under the direction of another qualified conservator, whether in private or within an institutional system.

E. Request for Consultation

If, for any reason, before or during treatment the owner or custodian desires another opinion on procedure through consultation with another conservator, this should not be regarded as evidence of want of confidence and should be welcomed by the conservator.

F. Consultation

No person engaged in the profession of conservation can expect to be expertly informed on all phases of examination, analysis and treatment. In instances of doubt there should be no hesitation in seeking the advice of other professionals, or in referring the owner to a conservator more experienced in the particular special problems.

G. Misuse of Referral in Client—Conservator Relationships

Where clients have been referred for consultation or treatment, the conservator to whom they have been referred should, unless it was obviously otherwise intended, return the client to the original conservator as soon as possible. Efforts, direct or indirect, in any way to encroach upon the professional employment of another conservator are considered unprofessional.

H. Fee Splitting

The payment of a commission or fee to another conservator or any other person for the reference of a client is to be condemned as unprofessional. Division of a fee is only acceptable where it is based on a division of service or responsibility.

I. Comment on Qualifications of Another Conservator

It is unethical for a conservator to volunteer adverse judgement on the qualifications of and procedures rendered by another conservator except as such comment shall be to the mutual benefit of all concerned. In expressing an opinion about another practitioner, either voluntarily or at the request of someone outside the profession, the conservator must always conscienciously consider the iniquity of slander and scrupulously base his statement on facts of which he has personal knowledge. If his opinion is uncertain or dependent on hearsay, it is more constructive to withhold comment and to recommend instead someone of whom he has no doubt.

V. OBLIGATIONS TO THE PUBLIC

A. Education of the Public

In his relations with the public, every conservator should accept such opportunities as may be presented to educate the public in the aims, desires and purposes of his profession in order that a better popular understanding of conservation may be established. Such presentations should be in accordance with accepted principles of the time.

B. Safeguarding the Public Interests

In the interests of the public as well as their own profession, conservators should observe accepted standards and laws, uphold the dignity and honor of the profession and accept its self-imposed disciplines. It is the right of any conservator to give proper advice when it is requested by those seeking relief against negligent or unethical practices. Further, each conservator should do his part to safeguard the public against illegal or unethical conduct by referring the facts of such delinquency to the President of the AIC as described in the Bylaws, Section II, 12.

C. Expertises

Although the results of his examination and treatment of historic and artistic works may make it possible for him to contribute knowledge to the history of art and to the verification of the authorship or authenticity of an object, the issuing of paid expertises or authentications may involve conflict of interest and is not an appropriate or ethical activity for a conservator.

D. Appraisals

Because of his intimate contact with and knowledge of techniques of fabrication and the physical condition of historic and artistic works, a conservator is often asked to appraise for a fee the monetary value of an object. Since this activity may involve conflicts of interest inconsistent with the profession of conservation, and since appraising requires other specialized knowledge of market values and connoisseurship, appraisal for a fee is not recommended unless the individual is a professional member of a recognized professional society of appraisers.

E. Art Dealing

Engaging in the business of selling or purchasing for personal profit or acting as a paid or commissioned agent in the sale of historic and artistic works are activities considered to be inconsistent with the professional integrity of conservators.

F. Advertising

It is an accepted principle that the foundation of effective advertising is the establishment of a well merited reputation for professional ability and integrity. Thus it is recommended that conservators limit all forms of notices and communications which may be construed as advertising to the following:

1. Use of such a sign or signs which in size, character, wording, and position reasonably may be required to indicate the entrance of the premises in which the practice is performed.
2. Use of professional cards and letterheads on stationery, bill and receipt forms, indicating only the name, academic degree, Fellowship, conservation specialty, office address and telephone number. Fellows only may use the name of AIC.
3. Use of announcements of commencement of practice, change of location or restriction of practice.
4. Use of advertisements in newspapers, magazines and telephone directories, provided that their form and content do not detract from the high professional standards reflected elsewhere in this Code of Ethics and do not contain comparisons of ability and cost.

G. Solicitation of Clients

1. It is recommended that solicitations be confined to discreet announcements in newspapers and magazines inviting clients. Direct mailing to individuals, museums and institutions may be construed as an attempt to solicit clients unethically.
2. The judicious distribution of reprints and communications to colleagues is acceptable and an author may honor requests for his articles. Indiscriminate mailing without sufficient reason is construed as an attempt to solicit clients unethically or an attempt to bring undue attention to the author.

H. Statements in the Name of AIC
Individual members of AIC should not present opinions in the name of AIC to outside organizations or individuals.

PART TWO—STANDARDS OF PRACTICE

I. PREAMBLE

The following standards and procedures are approved by AIC as detailed guidelines to professional practice by conservators* in the examination and treatment of historic and artistic works. Such practice is considered to comprise three categories:

A. Examination, treatment and systematic maintenance of historic and artistic works, whether by private or institutional conservators.

B. Scientific analytical study of art objects for such purposes as identifying materials, methods of construction, modifications by age or other agencies, comparison with comparable material.

C. Supplying previously developed reference data which may bear on condition, authenticity, authorship or age of specific objects. This can be either by formal publication or private communication.

II. GENERAL CONSIDERATONS OF POLICY

These are broadly applicable to all categories:

A. Professional Attitude
It must be axiomatic that all professional actions of a conservator be governed by unswerving respect for the integrity of historic and artistic works. Such respect is manifest not only in policies of restoration, but in selection of courses of treatment, in safeguarding against accident, protection against loss and strict avoidance of misinterpreting technical evidence.

B. Contractual Relationships
A contract should include the need for a clear written statement of the following: the exact work to be done, the basis for charges, if any, the extent and substance of reports, including the photographs as appropriate, responsibility for insurance coverage deemed adequate for operator, owner and subject, provisions for safeguarding objects, methods of delivery and any subcontracting or reassignment of work.*

C. Assumption of Responsibility
It is a conservator's responsibility to contract for investigation or treatment only to the limits of his professional competence and facilities. Should he not be trained or equipped for a full scientific study by generally accepted current technical means, any specific limitations must be stated and accepted by both parties from the beginning. Whenever further opinion seems to be required, such further opinion or opinions are a necessary part of a comprehensive report. In the same manner, a conservator will be held irresponsible if he undertakes to carry out a course of treatment for which he is inadequately trained or equipped.

D. Interpretation of Evidence
An investigator has the obligation to present all the evidence he has developed about an object commissioned to him for study, favorable or otherwise, and also to supply from his professional knowledge a clear exposition of the significance of each part of the evidence. It will be held improper for him to make outright informal declarations as to age, authenticity and the like (which subsequently might form the basis of a claim of legal action) when each declaration exceeds the logical development of the specific evidence.

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*"Conservators" in the text also denotes "conservation scientists" when applicable.
*It is recommended that a lawyer be consulted.

E. Limitations on Aesthetic Reintegration
In compensating for losses or damage, a conservator can be expected to carry out little or much restoration according to a firm previous understanding with the owner or custodian, and the artist, if living. However, he cannot ethically carry compensation to a point of modifying the known character of the original.

F. Outside Activities
It shall be considered inconsistent with the professional integrity of conservators in any of the three categories of procedure to engage in the following outside activities:

1. Issuing paid "expertises" or authentication.
2. Acting as paid or commissioned agent in the selling or purchasing of historic and artistic works.
3. Engaging in such selling or purchasing for personal profit.
4. Appraising for a fee the monetary value of historic and artistic works unless the conservator is a professional member of a recognized professional society of appraisers.

III. PROCEDURE FOR INITIATING, CONDUCTING, AND REPORTING IN SCIENTIFIC ANALYTICAL STUDIES OF HISTORIC AND ARTISTIC WORKS

Whenever it becomes necessary for owners of historic and artistic works to request institutional or commercial analytical laboratories or private consultants to engage in scientific study of objects for the purpose of developing data which may bear on condition, authenticity, authorship or age of a specific object, the following procedure shall be followed by all parties concerned:

A. Initiating the Study
The owner of the object, or his qualified agent or a qualified officer of an institution, shall send to the examining agency a written request with statements covering the following points as required:

1. The purpose of the study, listing any specific questions to be answered.
2. Whether (a) the whole object or (b) samples from the object are to be made available for study. If samples only are to be sent to the laboratory, the exact location of the samples on the object and the name of the person who took the samples and the date taken are to be given.
3. If the whole object is to be sent to the analyst (a) the legal owner, (b) its value, (c) to what extent it is covered by insurance, (d) by what carrier it is to be sent to the laboratory and returned to the owner and (e) that the object is to be sent to the investigating laboratory at the owner's risk and expense.
4. Explicit permission to take samples from the object during examination, defining any limitations.
5. Whether the investigator (a) is merely to report facts and observations or (B) if the investigator is expected to draw conclusions from the facts.
6. Whether the laboratory findings are (a) to be kept in strict confidence or (b) whether the findings, regardless of their nature, can be used by the investigator in formal publications and in oral declarations.
7. Whether any of the evidence produced is intended for use in legal proceedings.

B. Conducting the Study
The analyst or laboratory official on receiving the object shall:

1. Supply a written receipt to the owner verifying its condition and inform the owner how the object will be stored and guarded.
2. Inform the owner what fees, if any, are to be charged for the analytical services. If there is to be no charge, state that fact explicitly. State also what other charges may be made for photography, radiography and for other analytical services.
3. Make a photographic record of the condition of the object and of any subsequent alteration incurred in the course of the study.
4. Keep a careful and detailed written record of all observations and findings, giving dates.

C. Preparing and Submitting the Report

On completion of the investigation, the investigator shall:

1. Render to the owner a typewritten report of his findings with conclusion, if conclusions have been requested. The report shall cover methods of testing, kind and type of instruments and equipment used and analytical procedures employed in sufficient detail so that, if the owner wishes, the tests can be repeated and checked on the same object by an independent investigator in another laboratory. If it has been necessary with the owner's permission, to take samples from the object, give location and amount of each sample. Give location and dosage of irradiations (e.g., exposure to X-rays, gamma rays, iridium or other forms of radiant energy).
2. List all other persons who assisted or cooperated in the scientific investigation.
3. List what published works or authorities he has consulted in the course of the study.
4. State what limitations, if any, he may wish to place on the use of the findings. That is, whether or not the findings may be used voluntarily in legal proceedings; whether or not they may be quoted in formal publications or in oral declarations.

IV. PROCEDURE FOR ENGAGING IN AND REPORTING OF EXAMINATION AND TREATMENT OF HISTORIC AND ARTISTIC WORKS BY PROFESSIONAL CONSERVATORS OF INSTITUTIONS AND REGIONAL CENTERS

A. Report of Examination

Such reports shall include in writing the following information where applicable:

1. Date of examination and name of examiner.
2. Identification of object with the one referred to in the report by means of photographs, verbal descriptions, measurements and identification numbers.
3. Descriptions of materials, structure and method of fabrication. Physical, chemical and biological identification of materials composing the object. Statement of method of determination employed or reference to published standard method.
4. Record of alteration and deterioration. Locations and extent of physical defects, chemical alteration and its products, previous repairs and compensation. Statement of method of determination sufficiently detailed to permit duplication by another examiner.
5. Deductions or interpretations of observations and analyses. Comments relative to the degree of alteration.
6. Where evidence indicates forgery, tests which can supply the necessary information on materials and structure shall be employed. After thoroughly checking his results, the examiner shall recommend consultation with one or two disinterested individuals qualified by scientific or art historical training to review the evidence.

B. Proposal for Treatment

Before any treatment is undertaken, a summary or copy of the examination record shall be supplied to the responsible custodian of the object. This shall be accompanied by:

1. A statement of exactly what conditions it is proposed to correct.
2. An outline of the proposed treatment.
3. An estimate of the probable time required for the treatment.

The official custodian's written approval shall be secured before treatment is begun.

C. Report of Treatment

Such report shall include where applicable:

1. A statement of the procedures followed in the current treatment with exact descriptions of materials and methods, including:
   (a) The method by which accretion or deterioration products were removed.

(b) Method and materials used in correcting distortion in form and shape and in reinforcing, consolidating, stabilizing and protecting structure and surface.

(c) Kind, extent and location of compensation employed.

2. Photographs, as follows:

(a) Condition before treatment, with date.

(b) Photograph in "actual state" without compensation.

(c) Photograph after treatment, with date.

(d) Photographs as required to supply data about structure, method of fabrication and state of object as revealed during process of treatment. Photographs or diagrams which clarify method of reconstruction or compensation.

V. CONTRACTUAL PROCEDURES APPLYING TO EXAMINATION AND TREATMENT OF HISTORIC AND ARTISTIC WORKS BY PRIVATE PROFESSIONAL CONSERVATORS

These do not differ from those applying to institutional conservators except in the fields of contractual relations* and assumption of responsibility. Procedures in these fields shall include:

A. Written proposals stating:

1. Work to be done, estimated charges and estimated date of completion.
2. Arrangements for insurance and its specific coverage, method of delivery and provisions for safeguarding objects. (See VI.B.)
3. Any sub-contract or reassignment of work proposed.

B. A signed contract by the owner or his authorized agent, which may be a signed copy of the letter of proposal.

C. Agreement to give due notice to owner or custodial institution and to receive authorization before objects are removed from operating or storage building to a new location, unless such action is required for emergency safety reasons.

VI. OPERATING SAFETY PROCEDURES FOR CONSERVATORS

A. Safety of Personnel

All practitioners must follow the latest codes of the appropriate government regulations regarding occupational safety and health.*

1. **Radiation.** X-ray installations and operation procedures and use of radioactive sources should conform to approved specifications. Most state health or labor departments will supply an inspection service to determine the operating safety of radiographic installations.
2. **Toxic Vapors.** Adequate exhaust and ventilation must be a part of all laboratory installations where volatile toxic materials are habitually used. Appropriate vapor respirators should be available at all times.
3. **Mechanical Equipment.** Power tools of all kinds should be provided with adequate light, operating space and safety guards. Their use should be restricted to properly qualified and authorized persons. Cleanliness should be rigidly enforced. Instruments producing dust, abrasive powders and the like should be equipped with positive exhaust systems and operators should be provided with appropriate respirators.

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*It is recommended that a lawyer be consulted as to the adequacy of the contract until such time as a standard form be adopted.

*Up-to-date information may be obtained regionally through the United States Government-Labor Department/Occupational Safety and Health-Area Office listed in the Telephone Directory.

4. **Corrosive Liquids.** Standard laboratory requirements for quantity storage and operating containers of acids, alkalis and other reagents as well as solvents should be rigidly followed. Only authorized personnel should have access to them. Disposal of chemicals should follow approved procedures.

B. Safety of Historic and Artistic Works in the laboratory is of paramount importance.

1. **Protection Against Environmental Hazards** such as unsuitable levels of relative humidity, temperature, light and atmospheric pollution (including solvent vapors) should be provided.
2. **Protection Against Theft.** Working and storage areas should be of adequate construction and capable of sytematic locking routine. Only authorized personnel should have access.
3. **Protection Against Accidental Damage**
   - (a) Working and storage areas should be adequate for safe handling and storage of objects. Individual storage racks for paintings and shelves for three-dimensional objects should be available. Working equipment should include sturdy, well designed furniture such as tables, easels, horses.
   - (b) Objects should be moved or handled only by experienced persons. Auxiliary personnel should not be permitted to handle objects without adequate training and supervision. They should not engage in activities for which they have inadequate professional training.
   - (c) Objects should not be removed from the operating or storage buildings except on due notice and with authorization by the owner or custodial institution, except when required for safety reasons.
   - (d) Transportation and packing of objects should be by approved agencies and according to established methods.
4. **Protection Against Fire.** Adequate precautions should be taken to meet the requirements of the particular insurance underwriter used. Working and storage areas should be equiped with alarm, smoke detection and extinguishing apparatus. Uses to which other parts of the building housing the studio or laboratory may be put should not be of a hazardous nature.

PART THREE—ENFORCEMENT

Violation of the AIC Code of Ethics and Standards of Practice can lead to revocation of member's Fellowship. Upon receipt of substantial evidence of repeated violations in the face of notice and objection thereto from the Board of Directors of AIC, the board may take any action deemed necessary to protect the integrity of the institute. Such action shall be subject to appeal, review and final decision by the Grievances Committee described in the AIC Bylaws.

PART FOUR—AMENDMENTS

Amendments or changes in this Code of Ethics and Standards of Practice must be initiated by petition from at least five Fellows of AIC to the Board of Directors, who will direct the appropriate committee to prepare the amendments for vote. Acceptance into the Code of amendments or changes must be affirmed by at least two-thirds of all AIC Fellows voting.

Senator **Kennedy**. We would like to have your whole statement if you have one, but if you could just comment briefly.

STATEMENT OF EDWARD J. SACK, AN ATTORNEY

Mr. **Sack**. I think the issue that concerns conservators is raised by the testimony this morning. During the testimony of the Volunteer Lawyers for the Arts, they say on page 10 that by limiting artists' rights to instances of significant or substantial alteration, our problems would be taken care of. But we think that these words are extremely vague. There is no legal precedent as to what significant or substantial alteration is. It makes the bill very vague and ambiguous, and I don't think it helps the purpose of the bill to have these words in it. And if they stay in the bill, that is why we need an exemption for conservation.

I will give an example: We heard earlier about a sculpture that had been painted a different color. Well, color can change by passage of time. If you have a blue color on a painting, and an old-fashioned varnish is put on it, that varnish turns yellow over a period of time, and yellow on top of blue produces green—and eventually you will have green where the blue was. Now, the restorer comes along and removes the old varnish, and changes the green to blue. That is an intentional, substantial alteration of the color, but it is done not to mutilate the work of art, but rather to restore it to the painting that the artist originally painted.

And that is why we think that there has to be an exemption for conservation.

Senator **Kennedy**. Fine. Thank you very much.

You have other examples too, and it will be very helpful to have them as part of the record as well. I am sure they will probably be very helpful to us.

Mr. **Sack**. I will be very pleased to provide other examples of that.

Senator **Kennedy**. Good.

Mr. Gussow.

STATEMENT OF ROY GUSSOW, SCULPTOR AND PRESIDENT, NEW YORK ARTISTS EQUITY

Mr. **Gussow**. Senator Kennedy, my name is Roy Gussow. I am a sculptor and president of New York Artists Equity Association.

I am pleased to speak in strong support of the amendment you have proposed. It helps to raise the esteem of the artist, which has greatly been demeaned since the 1969 tax law, when it separated the artists from all the other citizens in this country and disallowed his opportunity to donate his own work to public institutions and receive a tax deduction. I speak for 2,000 visual artists—members of this organization in generally the metropolitan area of New York City. I have personally completed many commissions for both city administrations and corporate headquarters.

Since becoming aware of the notion of "droit moral," I have personally included it in all my contracts. After a minimum explanation, the idea was accepted with understanding. This bill recognizes that the issue of moral rights is a national concern, not one to be addressed State by State, as it is now.

When artists' rights in this regard have been ignored very often it has been due to naivety and ignorance. After the unethical aspect was pointed out, understanding and acceptance followed. This amendment will help to educate the naive.

I made a commission for Xerox Corporation headquarters in Rochester, and a few years later my daughter was going to school at the Rochester Institute of Technology, and she discovered a student copying the sculpture in small scale. When questioned about it, he said he was asked to make an award for the Xerox Corporation. She referred this to me, and I referred this to my dealer, Grace Borgenicht, and I suggested that it was her responsibility to take care of my position.

She wrote a letter to the president of Xerox, and in two days the president called the gallery and spoke to Grace Borgenicht and said he was sorry—he was not aware of the fact that it was unethical—and he would cease it immediately.

In our position on this idea, there is greed, exploitation and blatant ignorance on the part of the "Kulture Vultures" (Kulture is spelled with a "K"). In this day of great technical development, almost anything can be duplicated, enlarged, diminished, in any quantity, in almost any material and, thereby, in my estimation, degraded. Ethical values are reaching a low level in certain areas. In fact, a former governor of the great State of New York took it upon himself to duplicate some of his own collection of painting and sculpture and to open a sales gallery on 57th Street.

At the beginning, sales personnel in this gallery could not tell me the quantity of reproductions, nor their authorization. I don't believe that the fact that he was a Republican had anything to do with this endeavor! (Laughter.)

Do you really want me to say it?

Senator KENNEDY. No, I understand it.

Mr. GUSSOW. Artists Equity was about to sue Nelson Rockefeller for this activity. He died in about one to two months' time after I became aware of it.

I know a sculpture that has been repainted, revised, relocated, rebuilt, and reproduced without permission from or consultation with the artist concerned. These, along with neglect, come under the category of mutilation—physical, aesthetic and moral mutilation. The New School for Social Research had in its premises a Thomas Hart Benton mural, which was designed to go around the room. It was purchased by Equitable Life Assurance and stretched out in one long panel. They received a considerable sum for this amount.

They also have an Arozco mural, which is in a sad state of deterioration. We have written to the President of the New School of Research, and got absolutely no response. Three months after that, when I suggested that perhaps he hadn't received the first letter, I sent him another one. And I had no response from that.

I think that the notion of "droit moral" should extend further back in our heritage. Whether the person is alive or not, I think is immaterial. This is still a part of our heritage. I believe that this bill will help to prevent such activities, but I don't think that the denial of ownership is enough. It should be stronger. I urge you to continue working for this bill, and I urge my fellow artists to spend some time being citizens and supporting it. The alternative is to remain victims.

I think that it should be acknowledged that art is a unique creation. It should not be put into the category of merchandise or marketability. I think all the privileges of a very unique creation should be given to this production.

Thank you.

Senator KENNEDY. Thank you very much.

I want to thank all of you for your patience here this morning. This has been, I find, an enormously useful and valuable hearing. It certainly has been very educational for me. In the Senate, we are basically generalists, and we come to areas of very special need and we try and craft and develop some ideas—some ways of trying to meet very basic and fundamental needs. It seems to me that we start off with the concept of the legislation, which in this case is to establish rights for the artist.

However, this isn't an artists' benefits bill, it is a fairness bill. I think that is how we ought to view it. It is the way that I perceive it—to permit and create rights, to which I think artists are very much entitled. We have had a number of very valuable suggestions and recommendations. We have also had some observations that need further defining, and further work.

That was really the purpose for this hearing, but I am impressed by the range of support for the proposal. Not only from the artists—some from the dealers, historians, as well as those who have been working in the legal profession on different aspects of these issues over a lifetime. The range of support for the legislation, I think, is extremely compelling.

We will take the recommendations. We will work with the various groups. We will submit additional questions. We will welcome additional testimony from others who are here who would like to make whatever comment that they would like. We will leave the record open for a week. If you want to send in your own observations, we will make it a part of the record as well. And hopefully, we will have the introduction for legislation similar to this early in the next Congress.

We will take into account the recommendations that have been made today, and make every effort to move the bill in an expeditious way through the Senate Judiciary Committee. Additionally, we will communicate with our colleagues in the House of Representatives on the Judiciary Committee. We know of their interest obviously, and need their support. We will attempt to get the understanding of the administration on this issue as well, but I am hopeful that we can persuade them. Otherwise, we will just have to vote and be sure that we get that.

I want to thank all of you very much. I am very grateful to all of you.

[Whereupon, at 12:10 p.m., the hearing was concluded.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

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VAGA

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V.A.G.A.
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This document submitted today, Tuesday, November 18, 1986 is in support of the VISUAL ARTISTS RIGHTS AMENDMENT OF 1986 (S. 2796.) recently introduced by Senator Kennedy.

Senator Kennedy's bill advocating increased visual artists rights protection on the federal level is timely, needed and very necessary. It has the full support of Visual Artists & Galleries Association, Inc. (V.A.G.A.).

Timely -- as our world becomes technologically more able to reproduce images, including art images, speedily and accurately, and there is an increasing demand for those images, growing daily. Needed and necessary -- for the United States to be able to protect its own artistic and cultural heritage.

Soon after V.A.G.A. was founded, we hosted an international conference with our European sister artists rights societies, in conjunction with "New York Copyright Week 1981." Since then, on an annual basis we have had the opportunity to learn about and debate the differences between artists rights protection in the U.S. and protection afforded artists in other countries.

At present, the United States is last on the list in comparison with our European affiliates in protection of the rights of visual artists.

Senator Kennedy's legislation corrects some of these weaknesses, such as including moral rights for artists. The "droit moral" for artists as an extension of the basic economic rights of copyright is long recognized in Europe. For many years countries other than the U.S. have recognized the value of their own cultural heritage and have enacted laws to protect and sustain that heritage. This bill allows the United States the chance to nurture its cultural heritage.

Another component of Senator Kennedy's bill is resale rights, or "droits de suite" which, as well, is long recognized by other countries as the artist's right. To date according to a survey carried out by UNESCO, "droit de suite" is legislated in Algeria, Belgium, Brazil, Chile, Congo, Costa Rica, Czechoslovakia, Equador, Federal Republic of Germany, France, Guinea, Hungary, Italy, Ivory Coast, Luxembourg, Mali, Morocco, Peru, the Philippines, Portugal, Senegal, Tunisia, Uruguay, and Yugoslavia.

Not too long ago a respected American artist whose work is in the collection of a major internationally renowned New York museum called V.A.G.A. for help. The museum that owned the work was using reproductions for Christmas cards and as posters for sale to the public. Not only was the artist not consulted, and was not to be included in any royalties from the sale of the reproductions, but the art work was distorted -- severely cropped and the museum's name spread across the bottom. Without this federal amendment, if this were to happen outside New York State, which has an Authorship rights act, the artist would have no regress.

Without this federal amendment, resale rights, equally important as an artist's economic right, are only available to artists for artwork sold in California. We have all heard the many stories of an artist selling his or her work to a collector, only to have the new owner shortly thereafter re-sell the work for many times its original price -- the artist receiving no economic benefit.

The basic principle of artists rights recognized throughout the world is payment for use. It is our belief that artists must be allowed the economic opportunity to benefit when others benefit economically from their artistic endeavors. Without that opportunity artists are not free to create -- they cannot sustain themselves without government or private subsidy or without independent income or supplementary employment.

The VISUAL ARTISTS RIGHTS AMENDMENT OF 1986 (S. 2796.) will bring much needed public awareness that artists have economic and other rights to their creations, and, like all of us who work for a living in this society, have a right to benefit from their chosen livelihood.

ABOUT V.A.G.A.

Since 1978, V.A.G.A., a not-for-profit artists membership association, has acted as the national artists copyright society. It is our intention at this time to state our willingness to implement this bill and to act as the administrator for the resale rights for American artists.

The administration of such rights would be in tandem with our existing administration of artists copyright royalties. We would work closely with the U.S. Copyright Office to effect the fair collection and administration of resale rights.

For American artists, V.A.G.A. was founded in 1978 as a visual artists collective, for the artist, by the artist, with the purpose of administrating and protecting artists rights. We define that purpose as:

1. To help assure by law that those who create works of art have the opportunity to control and are fairly paid for, the use of their work.

2. To educate the public as to the basic principle of artists' rights eg. payment for use, and persuade it to honor something broader than copyright protection: such as moral rights and resale rights*.

3. To act collectivity, effecting the fair collection and administration of artists rights (with the least practical inconvenience and transaction cost to artists, users and the public).

We monitor uses, gather, audit and distribute payments, enforcing artists rights for our members. V.A.G.A.'s ability to enforce artists' rights is international, through our reciprocal agreements with our sister societies.

Artists' collective societies, like artists' rights legislation, has a long tradition in Europe. France's SADC in 1777 was the first artists' collective society. Since then artists rights societies have grown as the legislation has grown. The current international consortium of visual artists' rights societies includes

France, The Netherlands, West Germany, United Kingdom, Switzerland, Italy, Belgium, Hungary, Spain, Portugal, Austria, Poland, the U.S.S.R. and the U.S.A.

The guiding purpose of V.A.G.A. is that artists, like people in other professions, whose work is being used commercially will be enabled to make a decent professional living for themselves and their families by their art.

V.A.G.A.'s founding members include Richard Anuskiewicz, our current president (and former president of C.I.S.A.C., the international visual artists societies consortium), Larry Rivers, Robert Rauschenberg, Andy Warhol, Audrey Flack, Louise Bourgeois, Syd Solomon, Knox Martin, Jimmy Ernst, Robert Motherwell, Leon Polk Smith, Clayton Pond, Nancy Graves, Lowell Nesbitt, Deborah Remington, and Marisol, among others.

ABOUT THE BILL

The VISUAL ARTISTS RIGHTS AMENDMENT OF 1986 (S. 2796.) bill has three components.

1. Copyright notice: the copyright notice or (c) will no longer be required on works of visual art.

2. Moral rights: as an extension of and independent of copyright, the moral right allows an artist the right during his or her lifetime to claim authorship of the works that are publicly displayed, or, to disclaim authorship of such works because of any distortion, alteration mutilation. It also give the artist the right to assert any infringement.

3. Resale rights: the terms for resale rights under this bill applies to work sold for the time period during and artist's lifetime plus 50 years, where the seller pays the artist or agent a royalty equal to 7% of difference

between the seller's purchase price and the sale price or fair market value of property received in exchange for the work (but not to apply for works sold for less than $500). This right cannot be not waived, however, the artist may assign the right.

Any artist seeking resale royalty payments must register the artwork with the U.S. Copyright Office.

All sales of such works must be registered with the U.S. copyright office.

In the event the artist or Estate is not located, the royalty is to be paid to the NEA for use in the visual arts program.

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* V.A.G.A. seeks legislation that is broader than copyright protection: such as moral rights and resale rights together with performing rights, rights of display, rights in derivative works, lending rights and other rights of use of an artist's creative work.

DAVID HAYES

5724 Faraday Avenue
Riverdale, New York 10471

September 9, 1986

The Honorable Edward Kennedy
Senator from Massachusetts
United States Senate
Washington, D.C. 20001

Dear Senator Kennedy:

I applaud your efforts to give artists protection for their artwork simply by registering with the Copyright office.

My father is a successful sculptor with works in every major museum. In the last few years, I have seen the c-in-a-circle mark welded into every one of his works, a distraction that's been disheartening.

Your work will result in legislation that, while in the view of some may seem minor, will mean an enormous boost towards easthetic quality.

Thank you.

Sincerely,

David Hayes

SHAW AND REED
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RESIDENT COUNSEL

5225 KATY FWY
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HOUSTON, TEXAS 77024
TELEPHONE (713) 932-1840
ROBERT T. GIVENS
RESIDENT COUNSEL

September 10, 1986

Honorable Edward M. Kennedy
United States Senate
Washington, D.C.

Dear Senator Kennedy:

I read with interest in yesterday's New York Times about the bill you have introduced to protect the rights of artists, and am writing to let you know of my support. I have several artists as clients, and believe that federal action in this area is an excellent idea.

The third section of your bill appears to be similar to the New York Artists' Authorship Rights Act. I brought the first case in New York under this law in 1984, and obtained an injunction allowing my client to complete a building mural, and preventing the building's owners from destroying it. The case attracted scholarly and media attention, and I am enclosing a copy of an article in the Times about it.

I would appreciate receiving a copy of your bill, and would like to be kept informed of its progress. If my experience can be of any assistance to you or your staff, please do not hesitate to call on me.

Sincerely yours,

SHAW AND REED

Richard A. Altman

Richard A. Altman

RAA:fsb
Enclosure

.XXIII....No. 45,972 NEW YORK, SATURDAY, MARCH 3, 1984 30 CENT

The New York Times/Marilynn K. Yee

Robert Newmann with his mural, which adorns the rear wall of the Palladium Theater on East 14th Street.

Manhattan Wall Spurs a Test Case Over Art

By DAVID MARGOLICK

When Robert Newmann began sand- lasting a wall of the Palladium Thea- r in Manhattan in 1982, he intended to reate an experimental work of art.

Two years later, however, the roject has become an experiment of a ifferent sort: the first test of a new w protecting artists and the works ey create.

For the past year, Mr. Newmann aintains, the Palladium's new tenant as blocked him from completing his roject, a mural designed to coax a ariety of tones out of a brick wall. So, ting the Artists' Authorship Rights ct, signed by Governor Cuomo last ear and in effect since Jan. 1, he has ken tenant and the landlord to ur

T. .ae provides that works of t are not to be displayed publicly "in altered, defaced, mutilated or modi- ed form" or in such a way that they nder an artist's reputation. It was in- nded, according to one of its spon- rs, Assemblyman Richard N. Gott- ied, a anhattan Democrat, to "bal- roperty rights of owners creative rights of artists d society's right to safeguard its rtistic treasures."

Mr. Newmann — whose works have ppeared in the Corcoran Gallery and e Phillips Collection in Washington, d the Baltimore Museum of Art — insists that under the law he is entitled according to his agreement with the owner to complete the mural and to have it remain on the building, at 126-128 East 14th Street, until April 1986.

The tenant, the Muidallap Corporation, counters that while the statute protects artists against having their works altered or modified, it does not bar outright destruction. It says it stands to lose $220,000 unless it completes exterior modifications of the Palladium by June 1. It plans to use the theater for rock music and stage shows, and wants to paint the rear wall black and possibly install a new entrance in the wall.

"It is evident that Muidallap will paint over plaintiff's work entirely," the corporation stated in court papers. "This in no way mutilates the work or presents it in a way that would damage the plaintiff's reputation. It merely removes the work."

On Feb. 14, a State Supreme Court justice in Manhattan issued an order temporarily blocking Muidallap — Palladium spelled backward — from destroying the pinwheel-shaped mural. Yesterday, the parties were back in court, arguing over whether the injunction should remain in effect until the issues in the case are decided.

Shortly after moving to New York City in 1981, Mr. Newmann said, he searched lower and midtown Manhattan for six months, looking for a wall suitable for his project. The 40-year-old artist described his work as a "subtractive process" through which, he explained, he hoped to coax a variety of tones out of the bricks by sandblasting them at fixed intervals.

"It's kind of didactic, but the whole idea was to collaborate with Mother Nature and get information out of this wall," Mr. Newmann said. The project developed partly out of an interest in archeology developed while studying Mayan culture in Mexico, he added. "It's a piece of research as much as anything else," he said.

With the help of the Public Art Fund — a private, nonprofit organization that aids the public display of art — he negotiated an agreement with the Palladium's owner, Delmar Realty, and its tenant, Ron Delsener, the rock music promoter, in February 1982.

It authorized the installation of a "wall treatment" on the theater's rear wall, which can be seen from 13th Street, and further provided that in the event a new lease was negotiated, the owner would use his best efforts to persuade the new tenant to agree to the project.

Mr. Newmann and his five-member crew began working shortly after. Each month they erected scaffolding, installed templates and sandblasted a new wedge of the wall. The work stopped last April, however, shortly after Delmar negotiated a new lease with Muidallap. In August, Mr. Newmann says, Muidallap's president, Steven Greenberg, told him, "Your deal is off."

Project Costs $6,300

"It's just like running into a wall," said Mr. Newmann, who added that he could complete the $6,300 project in a matter of days. "The thing is sittin over there incomplete."

Mr. Newmann resolved to take hi case to court. After failing to persuad the Public Art Fund to handle it, he r tained Richard Altman, a lawyer private practice associated with Volu teer Lawyers for the Arts.

In addition to violating the artis rights law, Mr. Altman argues, Muid lap is violating Mr. Newmann's ov limited property rights in the P ladium — known in legal terms as "easement" — and is preventing M Newmann from performing his co tract with the National Endowment f the Arts, which is helping to finance t project.

Muidallap and the landlord ha denied both of these claims.

Issue Supported in Europe

The laws in many European cou tries provide that artists retain a "dr moral," or "moral right," over th works, protecting them from alterat or modification. American judges a legislators have been slow to recogni a similar right, however. In 1949, for stance, a referee in State Supre Court in Manhattan ruled that the d trine did not apply in New York.

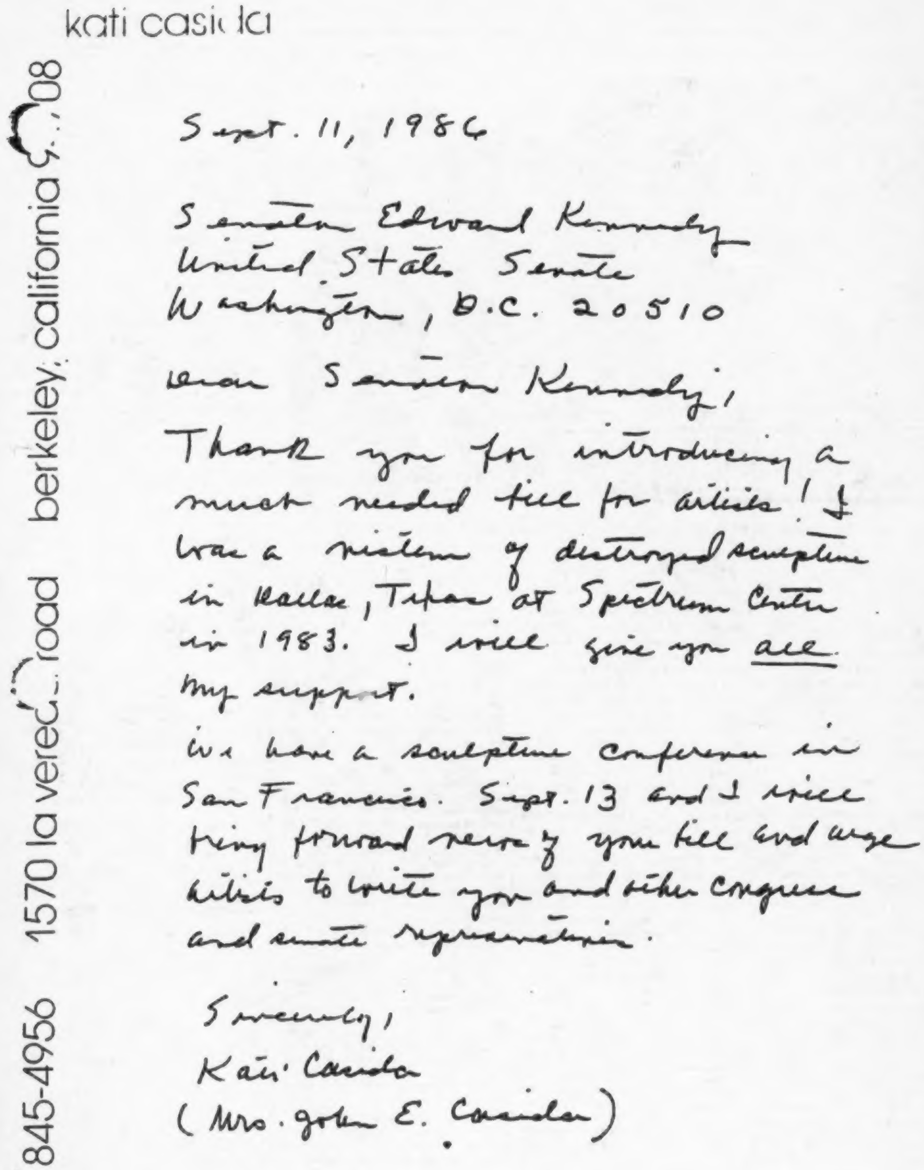
The referee refused to award da ages to Alfred D. Crimi after the R gers Presbyterian Church, at 236 W 73d Street, had painted over a fresc had commissioned him to paint. P ishioners at the church considered t painting's portrayal of a bare-chest Christ to place more emphasis on h physical attributes than spiritual qu lities.

Mr. Altman claims that in spirit a effect, the new law extends the prot tions artists enjoy in Europe to N York.

"This statute is really an enactme of droit moral, the essence of which that the artist has some control o the display of his artwork," he said.

But Muidallap's lawyer, Har Horowitz of Squadron, Ellenoff, P sent & Lehrer, asserts the New Y law was drafted far more narrowly, protect artists from having their wo altered and then misattributed to th rather than to preserve them in per tuity.

"The statute was intended to prot the reputation of an artist, not a work art," said Mr. Horowitz, a form chairman of Volunteer Lawyers for Arts. "There's a big difference tween changing a 'Newmann' and st attributing it to him, and destroyi one."



kati casida

(41 845-4956 1570 la vered road berkeley, california 9 08

Sept. 11, 1986

Senator Edward Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy,

Thank you for introducing a much needed bill for artists! I was a victim of destroyed sculpture in Dallas, Texas at Spectrum Center in 1983. I will give you all my support.

We have a sculpture conference in San Francisco Sept. 13 and I will bring forward news of your bill and urge artists to write you and other Congress and senate representatives.

Sincerely,
Kati Casida
(Mrs. John E. Casida)

ruth terrill
artist

September 15, 1986

Senator Edward M. Kennedy
Senate Office Building
Washington D.C., 20510

Dear Senator Kennedy:

I want to thank you for some legislation that has just come to my attention. I understand that you have proposed legislation to remove the requirement for artists to place a copyright symbol on the surface of their art work.

Placing this information of the composition has always been a difficult thing to do because it really does spoil the design. So thank you for this help.

Incidentally, this should also save some paperwork in the copyright office as part of the process to register work with the copyright office has required sending drawings/diagrams to scale, showing the exact size and location of the data on the surface of the painting. Hopefully, now, just a slide should be sufficient for registration.

Thank you again.

Sincerely,

Ruth TERRILL

9700 alpine rd. • box 120 star rt. 2 • la honda, ca. 94020 • 415/747-0442

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The Can-Am Building
101 Niagara Street
Buffalo, New York 14202
(716) 842-1356

September 16, 1986

Senator Edward Kennedy
The United States Senate
Capitol Building
Washington, DC 20032

Dear Senator Kennedy:

We would like to voice our support for your recent bill (introduced on September 9, 1986) which would provide artists with added copy and royalty rights.

As working artists in Buffalo, we are encouraged by governmental efforts to protect the legal rights of artists and to further the development of artistic awareness in our area.

Anne Gunderman Fine Arts Ltd., has recently coordinated the cataloging, appraisal and ultimate liquidation of the vast collection of the well-known artist/gallery owner, Anthony J. Sisti. Had your bill been in effect as a law we might have seen a fairer, more equitable distribution of the collection.

We look forward to hearing of the success of this bill in the House and the Senate. Please keep us updated.

Sincerely,

Anne Gunderman, owner/curator

Rebecca Allan

Rebecca Allan, assistant curator
Anne Gunderman Fine Arts Ltd.

New York, October 9th 1986

The Honorable
United States Senator
Edward M.Kennedy
United States Senate
Washington DC 20510

Monsieur le Senator,

My husband, the artist Christo, and I thank you very much for your letter of September 30th. 1986, informing us that you have been working for the cause of artists' copyright protections.

These rights are already well taken care of in Europe, for instance France has "the moral right of the artist" almost as strong as a law, and we think that the United States must give the same kind of protection to the U.S.A. artists.

We are not in a position to be able to offer our financial support, since we have just spent four million dollars of our own money (and loans) to complete Christo's latest work "The Pont Neuf Wrapped,Paris,1975-85", but our moral help and our congratulations are most sincere.

Christo joins me in sending you our friendly thoughts.

Jeanne-Claude Christo

Jeanne-Claude Christo

THEODORE BIKEL

October 24, 1986.

The Hon. Edward M. Kennedy
U.S. Senate
Washington, D.C. 20510

Dear Ted:

Thank you for writing to me about the artists' copyright bill.

As usual, you are right on target. Needless to say, you have my full support on the bill whose passage will go a long way toward righting a wrong which has plagued the visual artists for a long time now. We really are, at times, a dense people! Even when confronted with an obvious injustice, so many tend to fence-sit because "they don't know enough about it". Thank you for once again reminding the Congress of its duty. Artists are a small group of people whose vote, statistically, is hardly worth a damn. But we owe them our attention nonetheless.

In one regard I wish the bill had gone further. If you own an artist's painting and decide to donate it to a museum, library or hospital, then you can use its full market value as a tax deduction. Yet should the artist himself donate the work then he can deduct only the cost of the canvas, paint and frame. This situation is compounded by a further injustice: Should the artist die then all the unsold paintings in his/her possession are assessed full market value for the purpose of estate taxes and the artist's family may have to pay a heavy price for the dead artist's popularity. A double whammy, if ever there was one. The new tax law probably won't change this at all; contributions are still allowable as far as I read the regulations. Well, we shall have to deal with this also, if not by amending this bill then at a later date.

I send you my best wishes,

Theo

Theodore Bikel

Robert Parkison
watercolors

P.O. Box 365 Alpine, CA 92001 (619) 445-9749

Oct. 29, 1986

Senator Edward Kennedy
U.S Senate
Washington, D.C

Dear Senator Kennedy,

I have read with great interest of your sponsoring Senate bill 2796 "Visual Artists' Rights Amendment." While we have similar legislation in California, a national bill such as yours' is desperately needed to issure compliance.

My local representatives are lacking information on how I can help in your noble effort. Please let me know who I can write and how I can heep.

The artists of America need this Law

Please let us help you.

Sincerely,
Robert Parkison